# **2006 NINTH CIRCUIT ENVIRONMENTAL REVIEW: CASE SUMMARIES**

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I. Environmental Quality

A. Comprehensive Environmental Response Compensation and Liability Act

1. Pakootas v. Teck Cominco Metals, 452 F.3d 1066 (9th Cir. 2006).

Teck Cominco Metals, Ltd. (Teck), a Canadian company, sought interlocutory review of a district court's denial of its motion to dismiss an action brought by individual members of the Confederated Tribes of the Colville Reservation (Pakootas), in which the State of Washington intervened. Pakootas sought, under the citizen suit provision of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), [[1]](#footnote-2)1 a declaration that Teck violated a 2003 Environmental Protection Agency (EPA) order requiring Teck to assess a contaminated site on the Columbia River in Washington (Site). Pakootas had also sought penalties for non-compliance as well as recovery of costs and fees. The Ninth Circuit upheld the district court's denial of Teck's motion to dismiss for failure to state a claim, rejecting Teck's arguments that its Canadian smelter's discharge of waste into the Columbia did not cause it to become liable for arranging for the disposal of hazardous substances under CERCLA as well as Teck's argument that this case involved an extraterritorial application of CERCLA.

In response to a 1999 petition by the Colville Tribes under CERCLA § 9605, EPA assessed the Site, discovered heavy-metal contamination and the presence of slag, a smelting byproduct, and concluded in 2003 that the Site warranted listing on the National Priorities List (NPL). [[2]](#footnote-3)2 Teck owns and **[\*672]** 180operates a smelter in Trail, British Columbia, which from 1906 to 1995 discharged up to 145,000 tons of slag annually into the Columbia River, some of which accumulated at the Site. In December 2003, EPA ordered Teck, under CERCLA, to conduct a remedial investigation/feasibility study (RI/FS) [[3]](#footnote-4)3 for the Site. As of the date of the appellate decision's filing, Teck had not obeyed this order (Order), [[4]](#footnote-5)4 and the EPA had not attempted to enforce it.

In response to Pakootas's citizen suit, Teck filed a motion to dismiss, arguing the district court lacked personal and subject matter jurisdiction because the Order was based on activities by a Canadian entity with no United States presence and because the activities took place in Canada. Teck also argued Pakootas failed to state a valid claim under CERCLA. The district court denied Teck's motion to dismiss, holding that while the case involved CERCLA's extraterritorial application, dismissal was inappropriate because there was a significant federal question under CERCLA and that under CERCLA, Teck was a "person" [[5]](#footnote-6)5 and could be held liable as a hazardous waste "generator" [[6]](#footnote-7)6 or as a hazardous waste disposal "arranger." [[7]](#footnote-8)7 The district court sent its order for immediate review by the Ninth Circuit, per 28 U.S.C § 1292(b). [[8]](#footnote-9)8 Subsequently, the Ninth Circuit granted Teck's petition for interlocutory appeal and the district court granted Teck's motion to halt proceedings pending the appeal's outcome. The Ninth Circuit reviews de novo questions of law [[9]](#footnote-10)9 as well as district court rulings on motions to dismiss for failure to state a claim. [[10]](#footnote-11)10

The Ninth Circuit began by addressing Teck's argument that because Congress did not clearly indicate it intended CERCLA to apply extraterritorially, Pakootas's suit involved an invalid extraterritorial application of CERCLA. Noting that CERCLA, unlike the Clean Water Act, [[11]](#footnote-12)11 the Clean Air Act, [[12]](#footnote-13)12 and the Resource Conservation and Recovery Act (RCRA), [[13]](#footnote-14)13 is not regulatory in nature, **[\*673]** but instead imposes liability for hazardous waste site cleanup. The court explained that three conditions must be satisfied for CERCLA liability to attach: 1) the site where there is a release, actual or threatened, of hazardous materials must be a "facility," [[14]](#footnote-15)14 2) a release, actual or threatened, of hazardous materials must have occurred from the facility, [[15]](#footnote-16)15 and 3) the party must fit within one of the four categories of persons subject to liability. [[16]](#footnote-17)16

The Ninth Circuit next discussed whether the Site fit CERCLA's definition of "facility." [[17]](#footnote-18)17 The court reasoned that the Order correctly defined the pertinent "facility" as the Site because slag came to be located there. [[18]](#footnote-19)18 Noting that Teck did not argue against identification of the Site as a CERCLA "facility," the court concluded that, because the Site is within the United States, Pakootas's complaint did not entail an extraterritorial application of CERCLA.

Next, the Ninth Circuit addressed the "release" element of CERCLA liability. Noting the statutory definition of "release" [[19]](#footnote-20)19 and Ninth Circuit precedent establishing "that the passive migration of hazardous substances into the environment from where hazardous substances have come to be located is a release under CERCLA," [[20]](#footnote-21)20 the court held that the leaching of dangerous substances from the Site's slag was an entirely domestic release under CERCLA.

The Ninth Circuit next addressed the final condition of CERCLA liability, considering whether Teck was a "covered person" under CERCLA. The court began by evaluating Teck's alternate argument that if Teck had indeed "arranged for disposal" of the slag in Canada under § 9607(a)(3), [[21]](#footnote-22)21 then basing CERCLA liability on these actions entailed CERCLA's improper extraterritorial application. Teck argued that while § 9607(a)(3) applies to "any person," the Supreme Court's recent determination in Small v. United States [[22]](#footnote-23)22 that the phrase "any court" [[23]](#footnote-24)23 does not encompass foreign courts necessarily excluded foreign corporations from CERCLA's "any person." Providing that the Supreme Court used United States v. Palmer [[24]](#footnote-25)24 in deciding Small, the **[\*674]** Ninth Circuit applied the two guidelines used in Palmer to discern whether a statutory term like "any person" applies to foreign parties: 1) state jurisdiction over the party, and 2) legislative intent for the term to apply. [[25]](#footnote-26)25 In considering the first Palmer guideline, the court noted that Teck did not appeal the district court's finding of specific personal jurisdiction, and provided that although not required to consider this determination sua sponte, [[26]](#footnote-27)26 it agreed with the district court's finding based on Washington State's long-arm statute [[27]](#footnote-28)27 and Ninth Circuit precedent. [[28]](#footnote-29)28

Next, the Ninth Circuit considered the second Palmer guideline. Noting that beyond the definition of "any person" CERCLA does not indicate whom it covers, the court looked to CERCLA's definition of "environment," [[29]](#footnote-30)29 which includes "any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States." [[30]](#footnote-31)30 The court explained that this definition, considered in light of Congress's intent for CERCLA to apply to parties responsible for hazardous waste releases in the United States, [[31]](#footnote-32)31 showed that the second Palmer guideline was met.

After determining CERCLA applied to Teck under Palmer, the Ninth Circuit considered whether this application was domestic or impermissibly extraterritorial. The court noted that liability under CERCLA is triggered neither by arranging for the disposal of hazardous substances, nor by their actual disposal, but by the threatened release or release of such a substance. [[32]](#footnote-33)32 Thus, a currently legal disposal activity could result in CERCLA liability if that disposal threatens or causes the release of a hazardous substance. [[33]](#footnote-34)33 Because CERCLA liability does not attach to arranging for the disposal of hazardous substances or to actually disposing of such substances, the court surmised that the location where a party conducted such acts is not relevant in determining if there is an extraterritorial application of CERCLA. The court concluded that because Teck's actual or **[\*675]** threatened release took place at the Site in the United States, this case entails CERCLA's domestic application.

Next, the Ninth Circuit reinforced its conclusion that this case does not involve CERCLA's extraterritorial application by comparing CERCLA to RCRA. The district court had assumed this case involved extraterritorial application of CERCLA because to find otherwise would mean relying on the "legal fiction" [[34]](#footnote-35)34 that the release of hazardous substances at the Site is completely separate from Teck's discharge of those substances into the Columbia River in Canada. The Ninth Circuit provided that this "legal fiction" is a result of the distinctly separate purposes of CERCLA and RCRA; CERCLA imposes liability for cleanup of sites where there has been a threatened or actual release of hazardous substances and does not require liable parties to change their disposal practices, while RCRA and Canada's equivalent of RCRA regulate disposal activities in their respective countries.

Finally, the Ninth Circuit addressed Teck's argument that because it disposed of the slag itself it could not be held liable under § 9607(a)(3) for arranging the slag's disposal by another entity. Noting that neither the Order nor Pakootas specifically alleged Teck's liability as an "arranger," the court nevertheless considered the parties' arguments for a different meaning of the following ambiguous language in § 9607(a)(3):

any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for the transport for disposal or treatment, of hazardous substances owned or possessed by such a person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such substances … shall be liable for … certain costs of cleanup. [[35]](#footnote-36)35

Pakootas argued the phrase "by any other party or entity" refers to the party owning the waste, while Teck argued the phrase refers to a party with whom the owner arranges for disposal. The Ninth Circuit adopted Pakootas's construction, such that a party could be liable as an arranger without owning the waste. This is an approach the court had used in the past [[36]](#footnote-37)36 and entails reading the word "or" into the section: "any person who … arranged for disposal … of hazardous substances owned or possessed by such person [or] by any other party or entity." Teck argued for a **[\*676]** construction of § 9607(a)(3) requiring the removal of two commas, such that the pertinent language would read: "any person who … arranged for disposal or treatment … of hazardous substances owned or possessed by such person … by any other party or entity… ." Although the court acknowledged that an implication from an earlier Ninth Circuit case, Kaiser Aluminum & Chemical Corp. v. Catellus Development Corp. (Kaiser Aluminum) [[37]](#footnote-38)37 supported Teck's construction, the court reasoned that this construction would allow a hazardous waste generator to escape CERCLA liability by not "arranging" for disposal with a second party, contrary to the intent of Congress and CERCLA's comprehensive statutory scheme. [[38]](#footnote-39)38 The court took the suggestion of the State of Washington and Pakootas and dismissed the statement in Kaiser Aluminum upon which Teck had relied, declaring that the statement was ambiguous as well as classifiable as dicta.

In conclusion, the Ninth Circuit upheld the district court's denial of Teck's motion to dismiss for failure to state a claim, rejecting Teck's arguments that it was not liable under CERCLA for slag discharged from its Canadian smelter into the Columbia River that came to rest in Washington State.

B. National Environmental Policy Act

1. Earth Island Institute v. United States Forest Service, 442 F.3d 1147 (9th Cir. 2006).

Non-profit environmental organizations Earth Island Institute and the Center for Biological Diversity (Earth Island) appealed the district court's denial of their motion for a preliminary injunction to enjoin the United States Forest Service (USFS) from implementing two post-fire logging projects in the El Dorado National Forest. The Ninth Circuit reversed, holding the appellants were entitled to a preliminary injunction because they showed: 1) a strong likelihood of success on the merits of their claim that USFS's final environmental impact statements (FEISs) did not comply with the National Environmental Policy Act (NEPA) [[39]](#footnote-40)39 or the National Forest Management Act (NFMA), [[40]](#footnote-41)40 and 2) the possibility of irreparable injury if preliminary relief was not granted. The court further held the preliminary injunction was warranted because appellants had shown that the balance of **[\*677]** hardships tipped in their favor, and that an injunction would advance the public interest.

In October 2004, two extensive fires burned a combined 21,593 acres in California's El Dorado National Forest. These fires, dubbed the "Power" and "Freds" fires, burned at varying intensities through several Protected Activity Centers, Home Range Core Areas, and Riparian Conservation Areas. [[41]](#footnote-42)41 After developing restoration plans and partitioning the burned areas into eight separate sale units, USFS published draft environmental impact statements (EISs) in the Federal Register on March 25, 2005. The Forest Supervisor for the El Dorado National Forest subsequently requested an Emergency Situation Determination from the Regional Forester for both projects, [[42]](#footnote-43)42 estimating $ 12.1 million in lost revenue from timber deterioration if USFS delayed the Records of Decision (RODs). The Regional Forester granted the request, and issued final RODs for both projects on August 1, 2005. [[43]](#footnote-44)43

Earth Island sued in federal district court, seeking preliminary and permanent injunctions against implementation of the projects. The district court granted Earth Island's motion for a temporary restraining order (TRO), but subsequently vacated it and denied Earth Island's motion for a preliminary injunction. On expedited appeal, the Ninth Circuit initially denied Earth Island's emergency motion for an injunction pending appeal but later granted it sua sponte after oral argument.

The Ninth Circuit reviewed the district court's denial of preliminary injunctive relief under an abuse of discretion standard, reviewing facts for clear error and conclusions of law de novo. [[44]](#footnote-45)44 The court viewed Earth Island's challenges in light of the Administrative Procedure Act, [[45]](#footnote-46)45 under which agency decisions may be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." [[46]](#footnote-47)46 When expert opinions conflict, an agency has discretion to rely on the views of its own staff; the court reviews only to confirm the agency made "a reasoned decision based on its evaluation of the significance - or lack of significance - of the new information." [[47]](#footnote-48)47

**[\*678]** The court first confirmed the controversy was not moot, for effective relief remained viable. [[48]](#footnote-49)48 USFS conceded the appeal was not moot for the Power Project (where only two of six timber harvests were 100% complete), but contended the Freds Project was moot because timber harvesting was complete. The court disagreed, noting the logging company could still cut more trees, as its contract did not expire for two years. Effective relief also remained available, the court held, in the form of tree mortality guideline revisions, renewed spotted owl monitoring efforts, and more accurate bird surveys.

The Ninth Circuit then held that the district court applied an improper legal standard for granting a preliminary injunction by requiring Earth Island to demonstrate a "significant threat of irreparable injury." [[49]](#footnote-50)49 The Ninth Circuit held that to prevail on a motion for a preliminary injunction, plaintiffs who demonstrate probable success on the merits must only show the possibility of irreparable harm. [[50]](#footnote-51)50 The Ninth Circuit held Earth Island had shown such a possibility.

Having set out the proper standard for a preliminary injunction the Ninth Circuit addressed whether Earth Island had demonstrated probable success on the merits of its NEPA claim. The court explained that NEPA's procedural requirements oblige agencies to take a "hard look" at the environmental consequences of their actions, including all foreseeable direct, indirect, and cumulative impacts. [[51]](#footnote-52)51 Pursuant to NEPA, USFS prepared FEISs for the Power and Freds Fire Restoration Projects. These documents used mortality guidelines to predict which trees would eventually die from fire-related injuries, thereby indicating which trees to log. Earth Island challenged the accuracy of the tree mortality guidelines and rebutted USFS conclusions that the project areas lacked adequate soil cover. Earth Island argued the FEISs' guidelines for logging burned and scorched trees substantially over predicted tree mortality, thereby facilitating more logging than necessary. Earth Island also contested the USFS finding that large snags should be removed to reduce surface fuels. Earth Island asserted the FEISs did not comply with NFMA because the USFS failed to compile sufficient population data and habitat analyses for **[\*679]** Management Indicator Species (MIS) [[52]](#footnote-53)52 like the black-backed woodpecker, hairy woodpecker and Williamson's sapsucker.

On the merits of Earth Island's NEPA challenges, the court held USFS abused its discretion as to the tree mortality estimates. While the data table at issue in both FEISs was labeled "Probability of Tree Mortality," what it actually described was the likelihood that predictions of probabilities of tree mortality and survival were correct. The court explained that the FEISs did not contain actual probabilities of tree mortality. [[53]](#footnote-54)53 The court determined it was vital that this information be presented clearly, for the primary purpose of the FEISs was to justify cutting burned or scorched trees that would ultimately die. After reviewing expert testimony on both sides, the Ninth Circuit reasoned the FEISs' "misleading" presentation of tree mortality estimates was an abuse of discretion in either of two alternatives: either USFS itself misread the data chart as actually predicting tree mortality and so failed to take the requisite "hard look" at the data underlying their action, or USFS understood the data to indicate the likelihood of an accurate tree mortality prediction, but misrepresented the method and concealed the actual predictions of tree mortality. The FEISs' unclear presentation of data, the court noted, also impaired fulfillment of NEPA's public participation mandates.

The Ninth Circuit also held that the infirmities of the FEISs precluded the USFS from sufficiently assessing the potential effects on the California spotted owl, a potentially endangered species. [[54]](#footnote-55)54 The court reasoned that the inadequate tree mortality predictions in the FEISs would likely lead to excessive logging, and the excessive logging would have adverse effects on the owl that could not have been adequately assessed. The FEISs also failed to respond "explicitly and directly" to conflicting views about owl use of burned habitat, and failed to provide a detailed explanation as to why such habitat was unsuitable. As a result, the court held that the FEISs were deficient because the USFS improperly minimized negative side effects. [[55]](#footnote-56)55

Earth Island challenged the FEISs' determinations that logging was needed to increase ground cover and that dead trees needed to be cut to reduce future fuel loads. On those claims, the court deferred to USFS **[\*680]** reliance on the "reasonable" opinions of its own experts, holding the agency did not act arbitrarily or capriciously in discounting alternative evidence that Earth Island had offered. [[56]](#footnote-57)56

The Ninth Circuit held Earth Island's NFMA challenges would also likely succeed on the merits. The court ruled that the FEISs' reliance on habitat surveys of the three bird MIS did not satisfy USFS obligations under NFMA regulations [[57]](#footnote-58)57 and the Sierra Nevada Framework Plan. While the court recognized that habitat monitoring would have been appropriate in limited circumstances, [[58]](#footnote-59)58 here it held USFS use of habitat analysis in lieu of population monitoring was arbitrary and capricious because the 2001 Framework expressly requires population monitoring for the hairy woodpecker and Williamson's sapsucker. Moreover, the court noted, habitat data used for the black-backed woodpecker appeared outdated and failed to identify the methodology behind its conclusions.

The Ninth Circuit reversed the district court's denial of Earth Island's motion for a preliminary injunction, holding the organization was entitled to such relief upon showing a "strong likelihood of success" on the merits and the possibility of irreparable harm. [[59]](#footnote-60)59 The court held possible irreparable injury to Earth Island included unnecessary cutting of trees that would otherwise survive, harm to the California spotted owl, and harm to several MIS birds. Earth Island also showed that the balance of hardships tipped in its favor and that a preliminary injunction would advance the public interest. [[60]](#footnote-61)60 While USFS showed it would suffer economic losses if the court enjoined further logging, the court held that such losses did not outweigh potential irreparable damage to the environment. After reviewing Earth Island's arguments, the court deemed the organization's substantive NEPA and NFMA claims persuasive and remanded to the district court for further proceedings.

Judge Noonan concurred in the judgment, agreeing that the district court articulated the wrong standard as to the level of harm Earth Island needed to show. Judge Noonan declined, however, to forecast Earth Island's probable success on the merits, preferring instead to remand to the district court. The district court, Judge Noonan argued, is better equipped to estimate the probability of Earth Island's success on the merits after **[\*681]** reviewing the extensive scientific record. According to Judge Noonan, the district court should then apply the correct legal standard, pursuant to its factual findings.

2. Hale v. Norton, 476 F.3d 694 (9th Cir. 2007).

Alaska landowners, the Hales, sued for an injunction to compel the National Park Service (NPS) to allow bulldozer access, via a government road, to their inholding within the Wrangell-St. Elias National Park and Preserve (Park). The Hales argued the Alaska National Interest Lands Conservation Act (ANILCA) [[61]](#footnote-62)61 provided them with access rights not subject to analysis under the National Environmental Policy Act (NEPA). [[62]](#footnote-63)62 The district court denied the injunction and dismissed the case for lack of subject matter jurisdiction because there was no "final agency action" to review. [[63]](#footnote-64)63 The Ninth Circuit held that the district court did have jurisdiction under the collateral order doctrine and the particular permit request was subject to NEPA analysis because ANILCA stipulates that access rights are "subject to reasonable regulations issued by the Secretary to protect … natural and other values… ." [[64]](#footnote-65)64 Petitions for rehearing and rehearing en banc were denied.

The Hales accessed their property via a poorly maintained thirteen-mile stretch of road. After a house on the property burned down in 2003, the Hales used a bulldozer to haul in rebuilding supplies until NPS posted a public notice prohibiting most motorized vehicles. The Hales submitted an "emergency" application for a temporary permit, seeking to transport supplies before the winter freeze. NPS notified the Hales that an environmental assessment (EA) would be required by NEPA, and offered to prepare the EA for them free of charge. The Hales did not supply NPS with the information it requested to the conduct the EA, instead opting to file suit seeking an injunction forcing NPS to provide feasible access to their property. In their suit, the Hales also sought declaratory judgments that NPS was violating their right-of-way over the road by requiring a permit and that issuing a permit for use of the road was not a major federal action under NEPA.

The Ninth Circuit reviewed de novo the district court's dismissal for lack of subject matter jurisdiction. [[65]](#footnote-66)65 The collateral order doctrine, the court noted, preserves jurisdiction for a "small class" of orders that do not end the proceedings below but are nonetheless treated as final and immediately appealable. [[66]](#footnote-67)66 The doctrine only embraces orders that "conclusively determine the disputed question, resolve an important issue completely **[\*682]** separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment." [[67]](#footnote-68)67

The Ninth Circuit observed that the collateral order doctrine applies to judicial review of administrative proceedings, [[68]](#footnote-69)68 and examined the Hales' contention that NPS was precluded by ANILCA's access rights protections from subjecting the permit request to NEPA analysis. The court likened the Hales' challenge to an appeal from the rejection of a qualified immunity defense; like a qualified immunity defense, the type of challenge to an administrative decision that the Hales raised met the three prongs ("conclusiveness," "separability," and "unreviewability") of the collateral order doctrine. The court held: 1) "the regulations incorporating NEPA into the permitting process [were] clearly conclusive and not tentative;" 2) "the determination of whether [NPS] can incorporate NEPA into the permitting process is a pure and independent question of law;" and 3) "if the Hales must wait for the NPS's ultimate permitting decision … [the] decision to apply NEPA will likely become effectively unreviewable." [[69]](#footnote-70)69 The Ninth Circuit concluded the district court had jurisdiction to consider the Hales' challenge to the use of NEPA in the ANILCA permitting process.

On the substantive statutory claim, the Ninth Circuit first held that a "requirement that an EA or EIS be prepared in connection with a routine permit application might conflict with ANILCA's requirement of "adequate and feasible access," depending on the nature of the application and the possible time and cost involved in a NEPA review." [[70]](#footnote-71)70

The court then determined that an EA was appropriate in the situation at hand. The court explained that NPS acted reasonably in requiring an EA because the Hales' request to make sixteen trips with a bulldozer and trailer before the freeze up threatened to cause more environmental damage than more customary runs made after the freeze up. The court added that NPS attempted to accommodate the Hales by waiving the cost of the EA and completing it in a relatively short period of time.

After determining that it had jurisdiction based on the collateral order doctrine, the Ninth Circuit thus held that a NEPA analysis was not necessarily inconsistent with ANILCA and was appropriate with respect to the Hales' request to make sixteen bulldozer trips across a government road prior to the freeze-up.

3. WildWest Institute v. Bull, 472 F.3d 587 (9th Cir. 2006).

Forest protection groups, WildWest Institute and Friends of the Bitterroot (WildWest), brought suit against the United States Forest Service (USFS) seeking injunctive and declaratory relief to prevent implementation **[\*683]** of the Middle East Fork Hazardous Fuel Reduction Project (MEF Project), a hazardous fuel reduction project in Montana's Bitterroot National Forest. WildWest contended that USFS: 1) "irreversibly and irretrievably committed resources in advance of a final decision" in violation of the National Environmental Policy Act (NEPA), [[71]](#footnote-72)71 2) improperly excluded the public from collaborating on selected aspects of the MEF project, 3) censored the concerns of its own soil scientist, and 4) failed to adequately assess soil conditions in areas within the MEF Project area. After evaluating the probability of success on the merits for each of these claims, and weighing the possibility of irreparable harm to both parties, the district court denied WildWest's motion for a preliminary injunction. On interlocutory appeal, the Ninth Circuit upheld the district court's denial.

The MEF Project was developed pursuant to the Healthy Forests Restoration Act's (HFRA) [[72]](#footnote-73)72 mandate to implement hazardous fuel reduction projects. [[73]](#footnote-74)73 The project prescribed thinning for 4,938 acres in the Bitterroot National Forest to reduce the threat of wildfire, restore fire adapted ecosystems, and help restore stands afflicted by the Douglas-fir Bark Beetle. After conducting an Environmental Impact Statement (EIS), USFS adopted the version of the MEF Project contested by WildWest.

The Ninth Circuit reviews denials of preliminary injunctions with a "limited and deferential" lens. [[74]](#footnote-75)74 The scope of inquiry is confined to whether the district court abused its discretion. [[75]](#footnote-76)75 The court first assessed whether the district court abused its discretion in gauging WildWest's probability of success on its claims, then weighed the possibility of irreparable harm to both parties.

The Ninth Circuit held that the district court did not abuse its discretion in its treatment of WildWest's NEPA claim. WildWest argued that by pre-marking trees for harvest and spending $ 208,000 before issuing the Record of Decision, [[76]](#footnote-77)76 USFS had taken preliminary action that prejudiced its final decision. While noting that NEPA states that agencies may not "commit resources prejudicing selection of alternatives before making a final decision," [[77]](#footnote-78)77 the court held that here USFS's actions and expenditures did not unduly narrow the range of alternatives or predetermine the final outcome. The court reasoned that because USFS's preparatory actions were not irreversible, its commitment of resources did not compromise its ability to make a reasoned choice between alternatives.

The Ninth Circuit next turned to the district court's assessment of WildWest's second argument, that USFS adopted a ""pattern and practice of **[\*684]** selective inclusion and exclusion' of public collaboration." [[78]](#footnote-79)78 In particular, WildWest cited the exclusion of the President of Friends of the Bitterroot from a press conference. Rejecting the claim, the district court noted that USFS held many formal and informal meetings with WildWest and the public, and in any event the plaintiffs had no statutory right to attend the press conference. The Ninth Circuit determined that the district court's ruling was supported by the record and was not an abuse of discretion.

Next, the Ninth Circuit reviewed the district court's treatment of WildWest's arguments that faulted USFS's handling of soil disturbance issues. WildWest first claimed that USFS suppressed the findings of its lead soil scientist. The district court found that, because USFS incorporated the scientist's recommendations in the final EIS, the probability of success on that claim was low. The Ninth Circuit agreed, finding no abuse of discretion. WildWest's other soil disturbance claim was that USFS did not adequately verify soil conditions in 700 acres of the MEF Project area. WildWest likened USFS's behavior to that proscribed in Lands Council v. Powell, [[79]](#footnote-80)79 where the agency based its plans solely on data from the Timber Stand Management Record System (TSMRS) without verifying the information through on-the-ground investigation. The district court distinguished USFS's actions from those at issue in Lands Council, reasoning that USFS walked the units and verified TSMRS data through on-site monitoring. Moreover, USFS expressly stated how the on-site findings compared with the TSMRS estimates, and adjusted its plans accordingly. [[80]](#footnote-81)80 The Ninth Circuit concurred with that reasoning, and held the district court did not abuse its discretion

Finally, the Ninth Circuit held the district court did not abuse its discretion in weighing the respective hardships of both parties. Under HFRA, a reviewing court must take short-term and long-term effects, of both action and inaction, into account. [[81]](#footnote-82)81 The Ninth Circuit held the district court satisfied this mandate. The district court found that, whereas WildWest failed to marshal sufficient scientific proof or case law to support its claims, the possibility of a severe wildfire and financial losses from forgone timber sales were measurable injuries weighing in favor of USFS. WildWest offered "representative photographs" to support its claims that old growth timber would be harvested, but the Ninth Circuit deferred to USFS statement that the MEF Project did not contain old growth forests and declined to draw a contrary scientific conclusion. The Ninth Circuit held WildWest's mere "assertion and photography" insufficient to prove that the district court abused its discretion.

**[\*685]** In conclusion, the Ninth Circuit held that the district court did not abuse its discretion by denying WildWest's motion for a preliminary injunction. Stressing the narrow scope of its review at the close of its opinion, the court was careful to note that it made no ruling on the ultimate merits of WildWest's full case.

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

The Pit River Tribe, the Native Coalition for Medicine Lake Highlands Defense, and the Mount Shasta Bioregional Ecology Center (collectively Pit River) sued the U.S. Forest Service, Bureau of Land Management and Department of Interior (collectively Agencies) alleging that the procedures followed by the Agencies in extending certain leases in the Medicine Lake Highlands and in approving the construction of a geothermal plant by Calpine Corporation, [[82]](#footnote-83)82 violated the National Environmental Policy Act (NEPA), [[83]](#footnote-84)83 the National Historical Preservation Act (NHPA), [[84]](#footnote-85)84 the National Forest Management Act (NFMA), [[85]](#footnote-86)85 the Administrative Procedure Act (APA), [[86]](#footnote-87)86 and the Agencies' fiduciary obligations to Native American tribes. The district court granted summary judgment in favor of the Agencies [[87]](#footnote-88)87 and Pit River appealed. The Ninth Circuit reversed concluding that the Agencies did not take a "hard look" at the environmental consequences of the 1998 lease extensions and failed to adequately consider the no-action alternative.

The lawsuit stemmed from Calpine's efforts to build a geothermal power plant at Fourmile Hill near Medicine Lake, California. The Secretary of Interior designated the Medicine Lake Highlands as the Glass Mountain Known Geothermal Resource Area (Resource Area) pursuant to the Geothermal Steam Act of 1970, [[88]](#footnote-89)88 an act that allows the federal government to "issue leases for the development and utilization of geothermal steam" on federal land in national forests. [[89]](#footnote-90)89 In 1973, the Department of Interior (DOI) issued an environmental impact statement (EIS) for the nationwide application of the Geothermal Steam Act. With the exception of three sites, the 1973 EIS did not discuss implications for specific locations, but provided a tiered environmental review with specific details to be "identified, evaluated, and described in the environmental analysis record prepared for each lease area prior to any leasing action." [[90]](#footnote-91)90 The EIS also admitted that **[\*686]** issuing geothermal leases "may constitute … major Federal action significantly affecting the quality of the human environment" that would require subsequent EISs. [[91]](#footnote-92)91 In addition, the DOI stated in the EIS that further environmental evaluation would be made prior to construction of power plants and related facilities and added that if there are "significant potentially adverse environmental impacts not previously considered, an additional environmental statement may be necessary."

In 1981, the Bureau of Land Management (the Bureau) and the Forest Service released an environmental assessment (EA) to decide whether to allow geothermal leasing and "casual use" exploration of the Resource Area. The EA did not discuss cultural or tribal impacts of the proposed leasing, but mentioned that one of the directives for the Land Management Plan was to develop resources when "it is compatible with other uses" and with "special stipulations applied to sensitive areas." [[92]](#footnote-93)92 The 1981 EA also acknowledged that while "a decision to lease carries with it the right to develop a discovered resource, subject to the limitations of the lease," there were also environmental safeguards throughout the process and that EAs and EISs would be required at certain stages. [[93]](#footnote-94)93

In 1984, the Bureau and the Forest Service jointly issued a Supplemental EA tiered to the 1973 EIS that for the first time considered the potential effects of leasing activity on cultural, recreational, and spiritual aspects of certain features in the Medicine Lake area. The EA stated that the area remained culturally significant to modern-day Native Americans and that the American Indian Religious Freedom Act of 1979 [[94]](#footnote-95)94 "requires ongoing consultation with Native American organizations and individuals" in order to protect sites important to cultural traditions. [[95]](#footnote-96)95 The EA acknowledged that any surface-disturbing activity "will disturb and/or destroy the patterning of surface and subsurface artifacts … [and] have the potential to adversely affect the spiritual significance of natural features important to Native American groups." [[96]](#footnote-97)96 The EA also acknowledged the potential historical significance of the area, but concluded that "nomination and/or acceptance [to the National Register of Historic Places] is, however, no obstacle to a site's removal by scientific excavation." [[97]](#footnote-98)97 To address these potential impacts the Bureau included a table of mitigating measures. The EA still required that the lessee prepare "an operating plan for subsequent activities in exploration, development and operation of the lease" that would include additional environmental analysis and approval. [[98]](#footnote-99)98

After mailing the 1984 EA to approximately 100 individuals and organizations and receiving only four letters in response, the Bureau adopted **[\*687]** a Record of Decision (ROD) in 1985 in which it leased 41,500 acres in the Resource Area. It concluded that geothermal development would have no significant adverse impacts on the area and so an EIS was not necessary.

In June 1988, the Bureau issued the leases at issue in this case to Calpine's predecessor in interest, Freeport-McMoran Resource Partners Limited Partnership, without any additional environmental or cultural impacts analysis. The ten-year leases gave an exclusive right to develop geothermal resources on the land subject to stipulations regarding existing regulations, water use, and restrictions in particular affected areas. The lease also included a restriction forbidding surface-disturbing activities during the nesting season of the Goshawk. The Bureau did not complete an EA or EIS or consult interested tribes prior to issuing these leases.

Calpine did little during the initial lease term. In 1995, it submitted a plan of operation for a proposed Fourmile Hill Geothermal Exploration Project (Exploration Plan) in the same general location of the later-proposed power plant. The agencies drafted and distributed an EA in December 1995 and, after receiving little public comment, issued a Finding of No Significant Impact (FONSI) and approved the project in April 1996.

Calpine submitted a plan in September 1995 for a geothermal power plant: the Fourmile Hill Geothermal Development Project (Fourmile Hill Plant). The agencies began preparing an EIS in June 1996 and, after commissioning an ethnographic report to identify cultural resources for the local tribes in the area, they issued a draft EIS for the Fourmile Hill Plant. The public and the Pit River Tribe highly criticized the draft EIS.

In May 1998, the Bureau extended Calpine's leases for five more years without any further environmental review. In September 1998, the agencies issued a final EIS for the Fourmile Hill Plant (1998 EIS) that included different configurations for the facilities. Although the EIS mentioned a "no-action" alternative, it was rejected because "it would not meet the purpose and need for the proposed action," namely "to develop the geothermal resource on Calpine's Federal geothermal leases." [[99]](#footnote-100)99

In July 1999, the Keeper of the National Register of Historical Places issued a report determining that the Medicine Lake caldera was eligible for listing in the National Register and calling for studies of other sites in the area.

On May 31, 2000, the agencies issued a ROD approving the Fourmile Hill Plan, stating that the leases they had issued to Calpine created a "vested property interest" that superseded an Executive Order on Indian Sacred Rights. [[100]](#footnote-101)100 However, as part of the mitigation measures, the Bureau placed a moratorium on further development in the Resource Area for a minimum of five years "until an analysis of actual impacts of geothermal development can be completed by the authorizing agencies." This resulted in the Bureau suspending operation and production in multiple leases in the Resource Area.

**[\*688]** Pit River appealed the ROD to the Interior Board of Land Appeals and the Regional Forester for the Pacific Southwest Region. Both appeals were denied and the Bureau unilaterally lifted the moratorium stating that "the energy situation in the country, and particularly in the West, had changed." [[101]](#footnote-102)101

In May 2002, the Bureau extended Calpine's lease for another forty years with no additional environmental analysis. In June 2002, Pit River filed suit in the Eastern District of California and on February 17, 2004, the district court entered summary judgment for the agencies on all claims. [[102]](#footnote-103)102

The Ninth Circuit reviewed the district court's decision de novo, applying the same standards as the district court. [[103]](#footnote-104)103 The court reviewed the agencies' decision under the arbitrary and capricious standard of the Administrative Procedure Act (APA). [[104]](#footnote-105)104

Prior to addressing the merits of the case, the court answered two gateway questions: 1) whether Pit River had Article III standing to raise the claims, and 2) whether 2005 amendments to the Geothermal Steam Act affected the justiciability of Pit River's claims. [[105]](#footnote-106)105

Regarding the first question, the court initially identified the three constitutional standing requirements: injury in fact, causation, and redressability. [[106]](#footnote-107)106 The court found that Pit River adequately demonstrated injury in fact, citing Pit River's testimony that the tribe had used the lands in question for cultural and religious ceremonies for "countless generations" and a 1996 ethnographic report commissioned by the agencies that stated that these areas were "traditional cultural properties of … the Pit River Nation." [[107]](#footnote-108)107

Having determined that there was injury in fact, the court stated that the causation and redressability requirements were relaxed. [[108]](#footnote-109)108 Causation was not challenged, but the agencies asserted that the 1998 lease extensions were no longer justiciable because they were replaced by the 2002 lease extensions, thereby make them not redressable. The court concluded that it could still provide effective relief for Pit River either by invalidating the leases as of 1998, thereby invalidating the 2002 extensions, or by enjoining any surface-disturbing activity until the agencies complied with NEPA. Finally, the court rejected the agencies' argument that the preparation of the 1998 EIS foreclosed relief on Pit River's claims.

In regards to the 2005 amendments to the Geothermal Steam Act, the court determined that they did not render Pit River's claims moot by eliminating the Bureau's discretion to deny lease extensions. Prior to 2005, the Act stated that the agencies "may" extend any geothermal lease for successive **[\*689]** five-year periods. [[109]](#footnote-110)109 The 2005 amended Act states that "the Secretary shall extend the primary term of a geothermal lease for 5 years" if the lessee satisfies work commitment requirements of the lease and makes annual payments. [[110]](#footnote-111)110 In other words, if these two conditions were met, then "the statute eliminated the Bureau's discretion in extending geothermal leases … ." [[111]](#footnote-112)111 Since NEPA's EIS requirement only applies to discretionary federal decisions, [[112]](#footnote-113)112 Pit River's relief would be foreclosed if the 2005 amendment was retroactive.

The court then set out to determine whether the amendments applied retroactively. The court adopted the test from Landgraf v. USI Film Products, [[113]](#footnote-114)113 which provides if Congress expressly states that an amendment applies retroactively then the matter is settled. [[114]](#footnote-115)114 However, absent an express statement, the court must determine "whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when [it] acted, increase a party's liability for past conduct, or impose new duties with respect to transaction already completed." [[115]](#footnote-116)115 If so, the court presumes against applying the statute retroactively.

Applying Landgraf, the Ninth Circuit determined there was no such express statement. Furthermore, applied retroactively, the amendment would impose new duties on Calpine including new minimum work and payment requirements. Therefore, the court presumed against applying the amendments retroactively, and the case was not moot.

The court then turned to the merits of the case addressing the claims under NEPA and the NHPA. Because the statute of limitations had run on the 1988 leasing decision, Pit River claimed that the agencies violated NEPA, the NHPA, and their fiduciary trust obligations to the Pit River Tribe by failing to complete an EIS prior to extending the lease in 1998. The agency argued that its environmental analysis under the 1973 EIS, 1981 EA, and 1984 EA were adequate to cover the 1998 extension or, in the alternative, that the court could not provide adequate relief because the preparation of the post-lease-extension 1998 EIS that analyzed effects of the power plant already provided relief.

The first question the court addressed was whether under NEPA the agencies had taken the requisite "hard look" at the environmental consequences of their decision. [[116]](#footnote-117)116 This "hard look" had to include consideration of a "no action" alternative prior to the agency entering into leases that constitute "an irreversible and irretrievable commitment of federal forest land … that could have a significant impact on the environment." [[117]](#footnote-118)117 If **[\*690]** the agencies did not conduct such an analysis, it foreclosed the possibility of considering a reasonable range of alternatives. [[118]](#footnote-119)118 The court cited Conner v. Burford, [[119]](#footnote-120)119 a case in which federal agencies sold ***oil*** and gas leases, some of which did not allow the government to later preclude surface-disturbing activities. [[120]](#footnote-121)120

After the lease is sold the government no longer has the ability to prohibit potentially significant inroads on the environment. By relinquishing the "no action" alternative without the preparation of an EIS, the government subverts NEPA's goal of insuring that federal agencies infuse in project planning a thorough consideration of environmental values… . [The "no action" alternative] analysis would serve no purpose if at the time the EIS is finally prepared, the option is no longer available. [[121]](#footnote-122)121

However, that court noted that when the agency does not irretrievably commit resources, an EIS is not required. [[122]](#footnote-123)122

The question was then whether the Agencies irretrievably committed resources when they issued the leases and 1998 extensions or whether they reserved the right to preclude surface-disturbing activities entirely. The court determined that the 1998 lease extensions only reserved the agencies' right to limit development "when not inconsistent with lease rights granted," and not the absolute right to deny exploitation of the resources. [[123]](#footnote-124)123 Although there were some absolute limitations on surface-disturbances in sections of the leases for certain periods of the year, that was not enough.

The court supported its decision with the agencies' own interpretations of the leases. According to a 1999 briefing paper, although the agencies were considering a no action alternative, DOI Solicitors advised that "denial of the Projects would be a taking of private property rights associated with the leases… . The decision makers would like to have the authority to deny the geothermal Projects, which may require compensation to the leaseholders for the taking." [[124]](#footnote-125)124 The Court determined that this language demonstrated that the agencies "did not have the authority to deny the projects." [[125]](#footnote-126)125 The court also examined the ROD for Fourmile Hill Plant and the agencies' analysis that, although the surface-disturbance activities would have adverse effects on sacred sites under Executive Order 13007, it was not possible to deny the project without also denying Calpine's vested rights as a leaseholder.

The court then rejected the argument that the 1973 programmatic EIS adequately addressed the potential impact of leasing. Although the court held **[\*691]** in 1978 in Sierra Club v. Hathaway [[126]](#footnote-127)126 that the 1973 EIS was adequate for "casual use" exploration, that case dealt with casual leases that did not constitute "irreversible and irretrievable commitments" of resources for development. [[127]](#footnote-128)127 In addition, the ruling was based on the assumption that the leasing program would not proceed without "fully considering [the] obligation to comply with the EIS requirements of NEPA." [[128]](#footnote-129)128

The court also found the 1981 and 1984 EAs insufficient because they dealt only with the issue of leases and casual use exploration and not actual geothermal development.

The court also rejected the argument that the 1998 lease extensions were just a continuation of the status quo that did not require a separate assessment. [[129]](#footnote-130)129 If it were not for the extension in 1998, Calpine would have lost its right to develop the leased property and its ability to move ahead with the construction of the Fourmile Hill Plant. Therefore, the agencies were required to conduct an EIS prior to extending the 1998 leases.

Next the court addressed Calpine's argument that the 1998 EIS for the Fourmile Hill Plant "mooted" Pit River's claim because the preparation of the EIS was the relief the plaintiff sought. The court reframed the issue as one of standing and, more specifically, redressability. The 1998 EIS did not provide the remedy Pit River sought because it was an ex post facto environmental review that could not include the no-action remedy necessary in the required review of a ""maximum range of options'" in an EIS. [[130]](#footnote-131)130 The court, citing two of its earlier decisions, explained that the NEPA procedures must be integrated into the decision-making process "as close as possible to the time the agency is developing or is presented with a proposal." [[131]](#footnote-132)131 In Save the Yaak Committee v. Block, [[132]](#footnote-133)132 the court held that the Forest Service's completion of an EA two years after starting construction on a road was untimely and "seriously impeded the degree to which their planning and decisions could reflect environmental values." [[133]](#footnote-134)133 In Metcalf v. Daley [[134]](#footnote-135)134 the court held that the issuance of a FONSI for hunting of gray whales was insufficient because the EA was prepared after the government agencies had already entered into two agreements with the Makah Tribe. This was a "irreversible and irretrievable commitment of resources" prior to environmental review. [[135]](#footnote-136)135

The court in this case found even more reason, as compared to Save the Yaak and Metcalf, to hold that the later environmental review was insufficient. Not only was the EIS untimely, but it failed to address the issue **[\*692]** of whether the land should be leased at all and only discussed configurations of the proposed power plant. The no action alternative was not considered because it was inconsistent with the purpose of the project, namely developing the geothermal resources. This did not fulfill the hard look requirement of NEPA.

Therefore, the Ninth Circuit held that "the 1998 lease extensions - and the entire Fourmile Hill Plant approval process for development of the invalid lease right - violated NEPA." [[136]](#footnote-137)136

The Pit River Tribe also claimed that the agencies violated the NHPA by not identifying traditional cultural properties prior to the extension of the leases. The district court found that the 1998 EIS provided all the relief sought or, in the alternative, [[137]](#footnote-138)137 that the NHPA did not apply to the lease extension because the extension simply maintained the status quo. The court rejected these decisions. "NHPA is similar to NEPA except that it requires consideration of [the action's effects on] historical sites, rather than the environment." [[138]](#footnote-139)138 If the agency determines an action may affect the historic values of an Indian tribe, the agency must give the tribe an opportunity to participate [[139]](#footnote-140)139 early in the undertaking process. [[140]](#footnote-141)140 The court held that, similar to the claims under NEPA, the lease extensions were a federal undertaking requiring review and that an ex post facto review could not cure the earlier violation because it did not address the no action alternative. Therefore, the court held that the agencies violated NHPA.

Lastly, the court held that the agencies violated their fiduciary duty to the Pit River Tribe. It cited two earlier decisions in which it held that the federal government owes a fiduciary duty to the tribes [[141]](#footnote-142)141 and that this duty includes ensuring compliance with regulations and statutes not specifically aimed at protecting the tribes. [[142]](#footnote-143)142 Because the court decided that the agencies violated NEPA and the NHPA, it concluded that the agencies also violated their minimum fiduciary duty to the tribe. However, the court did not reach the question of "whether the fiduciary obligations of federal agencies to Indian nations might require more." [[143]](#footnote-144)143

In conclusion, the Ninth Circuit held that the agencies violated NEPA, NHPA, and their fiduciary duty to the Pit River tribe for failing to conduct an EIS prior to the 1998 lease extensions. Hence, the court ordered that the five year extensions and the subsequent forty-year extensions be undone and the rest of the project approval process be set aside. The court did not reach Pit River's claims for actions subsequent to the 1998 extensions including the 2000 agency decisions, the NFMA claims, and the APA claim related to the **[\*693]** rescission of the development moratorium. The court reversed the district court's summary judgment in favor of the agencies and directed the district court to enter summary judgment in favor of Pit River.

5. "Ilio"ulaokalani Coalition v. Rumsfeld, 464 F.3d 1083 (9th Cir. 2006).

Plaintiffs, "Ilio"ulaokalani Coalition, a Hawaii nonprofit corporation, and Hawaii unincorporated associations Na "Imi Pono and Kipuka (Hawaiian Groups), appealed a district court's grant of summary judgment in favor of defendant Army, arguing that the district court incorrectly found that the Army's public notice efforts and consideration of reasonable alternatives in connection to its transformation of a Hawaii-based brigade (Brigade) into a Stryker Brigade Combat Team complied with the National Environmental Policy Act (NEPA). [[144]](#footnote-145)144 The Ninth Circuit Court of Appeals upheld the district court's finding that the Army's public notice efforts complied with NEPA, but reversed the finding that the Army had sufficiently considered reasonable alternatives under NEPA, remanding and requiring preparation of a supplemental site-specific supplemental environmental impact statement.

In December 2000, the Army published its notice of intent (NOI) to prepare a programmatic environmental impact statement (PEIS) evaluating the thirty-year Army Transformation Campaign Plan (ATCP) in the Federal Register, [[145]](#footnote-146)145 and published a public notice seeking comment on the PEIS in USA Today, [[146]](#footnote-147)146 without publishing notices in the Hawaii media. In October 2001, the Army made the draft PEIS identifying the Brigade as selected for transformation available for public comment, publishing notices in USA Today [[147]](#footnote-148)147 and the Federal Register, [[148]](#footnote-149)148 neither of which indicated that Hawaii would be affected. In February 2002, the Army issued its Record of Decision (ROD) and its Final PEIS, which considered only the alternatives of full implementation and no action, determining that full implementation of the ATCP was the preferred alternative. Next, employing a tiered application of NEPA, [[149]](#footnote-150)149 the Army undertook a site-specific supplemental environmental **[\*694]** impact statement (SEIS) for the Brigade's transformation, beginning scoping by seeking and receiving input from a range of Hawaii entities [[150]](#footnote-151)150 and eventually considering three alternatives, none of which provided for action outside of Hawaii. [[151]](#footnote-152)151 The Army issued the Final SEIS in May 2004 and in July 2004 followed with the ROD affirming its commitment to transforming the Brigade in Hawaii. Subsequently, Hawaiian Groups challenged the sufficiency of the Army's procedure under NEPA in district court, arguing that the PEIS and SEIS did not consider sufficient alternatives and that the Army did not provide sufficient public notice. [[152]](#footnote-153)152 The district court found the Army complied with NEPA and granted its motion for summary judgment. [[153]](#footnote-154)153

The Ninth Circuit reviews de novo a district court's grant of summary judgment [[154]](#footnote-155)154 to determine whether the district court applied substantive law correctly and whether there exist any genuine issues of material fact, viewing the evidence in the light most favorable to appellants, [[155]](#footnote-156)155 and setting aside agency decisions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." [[156]](#footnote-157)156 In reviewing the adequacy of an environmental impact statement (EIS), the Ninth Circuit applies a "rule of reason" [[157]](#footnote-158)157 standard of review functionally identical to the "arbitrary and capricious" standard [[158]](#footnote-159)158 to determine if the agency took a "hard look" at its decision's environmental results. [[159]](#footnote-160)159

The Ninth Circuit began by addressing the district court's holding that Hawaiian Groups were barred from arguing that the Army considered insufficient alternatives in the PEIS because Hawaiian Groups failed to comment during the creation of the PEIS. Although upholding the district court's denial of summary judgment, the Ninth Circuit provided that a **[\*695]** holding that the Army failed to meet notice requirements under NEPA was not necessary to the conclusion that Hawaiian Groups had not waived its right to challenge the extent of alternatives analyzed in the PEIS. [[160]](#footnote-161)160 The court noted that compliance with NEPA is mainly an agency responsibility and that faults can be so blatant that ""there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action.'" [[161]](#footnote-162)161 In applying this standard, the Ninth Circuit analogized to an earlier case in which it held an EIS invalid where the agency was independently aware of issues of concern to the plaintiffs. [[162]](#footnote-163)162 The court observed that there was significant evidence that the Army recognized the problem Hawaiian Groups raised with the PEIS, namely that the Army failed to justify its decision to transform the Hawaiian brigade in Hawaii, [[163]](#footnote-164)163 and provided that Hawaiian Groups had not waived the right to challenge the adequacy of the Army's analysis of reasonable alternatives.

Next, the Ninth Circuit addressed the district court's determination that the Army's tiered NEPA analysis sufficiently analyzed reasonable alternatives, beginning by stating the law governing consideration of alternatives in an EIS. [[164]](#footnote-165)164 The court proceeded to consider whether the Army's PEIS should have examined the site-specific impacts of transforming the Hawaii-based brigade in Hawaii, reviewing under the standard set forth in California v. Block. [[165]](#footnote-166)165 The court noted that a "PEIS constrains future decision-making and must therefore analyze alternatives in sufficient detail to prevent foreclosure of options with insufficient consideration." [[166]](#footnote-167)166 Minutes **[\*696]** of an Army planning meeting conducted after the PEIS but before the SEIS indicated that during the PEIS the Army recognized that it had decided to transform the Hawaii-based brigade in place, [[167]](#footnote-168)167 triggering the requirement for site-specific analysis, including consideration of alternative sites. Because not performed in the PEIS, the court reasoned that NEPA required site-specific analysis in the SEIS; although NEPA encourages [[168]](#footnote-169)168 tiering, the Army could not escape its requirement to perform a site-specific analysis through improper use of tiering. In response to the Army's argument that it was not required to analyze alternative sites because it had not crossed the "site-specific threshold" in the PEIS and because the SEIS's purpose and need statement required the Brigade to remain in Hawaii, the court stated that "Somewhere, the Army must undertake site-specific analysis, including consideration of reasonable alternatives." [[169]](#footnote-170)169 The court provided that the scope of these alternatives is defined by the Army's purpose and need statement. [[170]](#footnote-171)170 Rejecting Hawaiian Groups' argument that the Army violated NEPA by defining its goals too narrowly, [[171]](#footnote-172)171 the court provided that the Army violated NEPA when it made the leap in reasoning from its stated goal [[172]](#footnote-173)172 to the decision to consider only the alternatives of no action and transformation of the Brigade in Hawaii, excluding any alternative entailing transforming the Brigade outside Hawaii. The court indicated that because the terms of the Army's purpose and need statement did not require transformation of the Brigade in Hawaii [[173]](#footnote-174)173 and because this transformation was an important part of a larger plan, [[174]](#footnote-175)174 alternatives involving transformation of the Brigade **[\*697]** outside Hawaii were reasonable. The court bolstered its conclusion by again referring to evidence in the record that the Army recognized its error in not supporting its decision to transform the Brigade in Hawaii, [[175]](#footnote-176)175 by noting the availability of an alternate location in Washington and by observing that the Army had relocated another brigade for transformation.

Finally, the Ninth Circuit addressed the Army's grounds for not analyzing alternatives to the transformation of the Brigade in Hawaii. The Army posited three reasons why transformation of the Brigade outside of Hawaii was not a reasonable alternative: "(1) location of the [Brigade] within the strategically important Pacific Rim; (2) the terrain and conditions in Hawaii which most closely approximate those likely to be found in the Pacific Rim; (3) proximity to major airbases and seaports makes deployment easier." [[176]](#footnote-177)176 The Ninth Circuit addressed the first two of these reasons in turn, providing that the Army's SEIS undermined its assertion that no viable alternative to transformation of the Brigade in Hawaii. In response to the Army's first reason, the court noted that the SEIS indicated that alternate locations near the Pacific Rim had been selected for transformation. [[177]](#footnote-178)177 Regarding the Army's second reason, the court observed that while the site in Hawaii selected to host the transformed Brigade, the Kawailoa Training Area (KLOA) on Oahu, was unique, [[178]](#footnote-179)178 it was also unsuitable for the large vehicles [[179]](#footnote-180)179 of the transformed Brigade. [[180]](#footnote-181)180 The Ninth Circuit concluded that **[\*698]** the Army's failure to consider alternatives entailing transforming the Brigade outside of Hawaii rendered its EIS inadequate. [[181]](#footnote-182)181

Circuit Judge Bea dissented, arguing that the Army's determination to transform brigades in place was entitled to deference and was reasonable; the majority should not have imposed its judgment that a suitable alternative to in-place transformation existed. Noting that Hawaiian Groups failed to challenge the Brigade's transformation in place as "arbitrary and capricious," the dissent argued that the majority misapplied and retooled NEPA precedent by reversing the district court's determination that plaintiffs should not have been granted relief in federal court because they failed to follow the required administrative process.

In conclusion, the Ninth Circuit upheld the district court's finding that the Army's public notice efforts complied with NEPA, but reversed the finding that the Army had sufficiently considered reasonable alternatives under NEPA, remanding and requiring preparation of a supplemental site-specific environmental impact statement.

6. Great Basin Mine Watch v. Hankins, 456 F.3d 955 (9th Cir. 2006).

Great Basin Mine Watch and the Mineral Policy Center (collectively Great Basin) appealed a district court grant of summary judgment to defendants United States Department of the Interior and the Bureau of Land Management (collectively Bureau). Great Basin had alleged that the Bureau's approval of two gold mining permits for the Newmont Mining Corporation (Newmont) violated several federal statutes, including the National Environmental Policy Act (NEPA), [[182]](#footnote-183)182 the Clean Water Act (CWA), [[183]](#footnote-184)183 and the Administrative Procedure Act (APA), [[184]](#footnote-185)184 but the district court disagreed and granted summary judgment for the Bureau on every claim. On appeal, Newmont intervened in the case, and the Ninth Circuit affirmed in part, reversed in part, and remanded.

Newmont had submitted a proposal to expand its South Operations Area mining facility, located six miles northwest of Carlin, Nevada. The expansion project (South Project) intended to deepen and continue dewatering an existing mine and to continue discharging groundwater into a nearby creek. Upon receipt of the proposal, the Bureau ordered the preparation of a draft and final Environmental Impact Statement (EIS) pursuant to NEPA. The Bureau also prepared a cumulative impact analysis, which detailed the hydrological effects of the Amended South Project and **[\*699]** other proposed and existing mines nearby, including another mine of Newmont's called the Leeville Project. The Bureau's Record of Decision ultimately chose an alternative to Newmont's proposal and implemented a mitigation plan. The Bureau then required Newmont to post an incremental bond for the first phase of the project as well as a bond groundwater and surface water monitoring.

One month after submitting the proposal for the South Project to the Bureau, Newmont submitted a separate proposal to expand its Leeville mine, located twenty miles northwest of Carlin, Nevada. This proposal involved plans to expand Leeville's existing mine and plans to haul Leeville's refractory ore to a processing mill at the South Operations Area. Upon considering the proposal, the Bureau released a draft and a final EIS, and the Bureau used the Cumulative Impacts Analysis it had developed for the South Project as a foundation for determining the cumulative impacts of Leeville. The Bureau's Record of Decision selected a modified alternative to the project and implemented a mitigation plan, and the Bureau ordered Newmont to post bonds for post-mine closure reclamation as well as for groundwater and surface water monitoring.

Great Basin filed suit, seeking judicial review of the final EISs, the Bureau's ultimate permitting decisions, and the bonding determinations. Both parties filed motions for summary judgment, and Great Basin sought to introduce an "extra-record document." [[185]](#footnote-186)185 The district court refused to admit the document into the administrative record, and it granted summary judgment for the Bureau on all of Great Basin's claims, finding that, for several of the claims, Great Basin had not exhausted its administrative remedies and thus could not raise them for the first time before the district court. The Ninth Circuit reviewed the district court's grant of summary judgment de novo, [[186]](#footnote-187)186 stating that it would review the Bureau's decisions under the APA and overturn if the decisions were arbitrary and capricious. [[187]](#footnote-188)187 The Ninth Circuit reviewed the district court's refusal to admit extra-record evidence for abuse of discretion. [[188]](#footnote-189)188

The Ninth Circuit first addressed Great Basin's two arguments under the CWA: 1) that the Bureau's approval of Newmont's mining permits violated ambient water quality standards because the mining projects would extend the periods during which existing bodies of water were dry, and 2) that the Bureau's approval of the mining permits violated Newmont's effluent standards because the mining projects' groundwater discharged pollutants in excess of the amount allowed by Newmont's pollution permit. The district court dismissed both arguments by granting summary judgment for the Bureau, explaining that the "drying effect" argument was within the **[\*700]** factual expertise of the agency and that groundwater argument was not raised before the Bureau.

The CWA regulates both the concentration of pollutants in bodies of water, or ambient water quality standards, as well as the discharge of pollutants from individual sources, or effluent limitations. [[189]](#footnote-190)189 Under section 1319(a) of the CWA, a state is responsible for enforcing ambient water quality standards, [[190]](#footnote-191)190 and, under section 401, a state must "provide a water quality certification before a federal license or permit can be issued for activities that may result in any discharge into intrastate navigable waters." [[191]](#footnote-192)191 The CWA gives authority to the states to administer ambient water quality standards and effluent limitations, and allows states to impose stricter standards then the federal minimums. [[192]](#footnote-193)192

Great Basin argued the Bureau's approval of the mining permits violated section 401 of the CWA, because the permitted operations would result in a drying effect, and such a drying effect violated federal ambient water quality standards. Great Basin relied on PUD No. 1 of Jefferson County v. Washington Department of Ecology (PUD) as support, claiming PUD held that the CWA's definition of pollution "encompasses the effects of reduced water quality." [[193]](#footnote-194)193 The Ninth Circuit disagreed with this interpretation, explaining that PUD holds a state "may set minimum flow standards as part of section 401 certification; it does not hold that states must do so." [[194]](#footnote-195)194 The Ninth Circuit bolstered its holding by pointing to cases from other jurisdictions in which the courts had held that the withdrawal of water did not constitute pollution. [[195]](#footnote-196)195 The Court also reconciled its holding with the recent Supreme Court case S.D. Warren Co. v. Maine Board of Environmental Protection (S.D. Warren), [[196]](#footnote-197)196 which held that release of water from a hydroelectric dam constituted a potential discharge under section 401 of the CWA. The Court explained that S.D. Warren "did not address whether individual states are required to regulate withdrawal of water under the [CWA]." [[197]](#footnote-198)197 Rather, S.D. Warren merely "reiterated that individual states have the responsibility of regulating water pollution and water use." [[198]](#footnote-199)198 The court next addressed Nevada law and concluded that it does not regulate the withdrawal of water under the CWA even though it may under PUD. [[199]](#footnote-200)199

**[\*701]** The Ninth Circuit next addressed Great Basin's second argument under the CWA - that the Bureau erred in approving Newmont's mining permits, because the mining projects' discharge of groundwater violated its discharge limitations permit. The district court had dismissed the claim by summary judgment on the ground that Great Basin had not exhausted its administrative remedies under the APA by raising the argument before the Bureau. On review, the Ninth Circuit interpreted the APA's exhaustion requirement broadly, explaining that the requirement was met if "the [administrative] appeal, taken as a whole, provided sufficient notice to the [agency] to afford it an opportunity to rectify the violations that plaintiffs alleged." [[200]](#footnote-201)200 The Ninth Circuit noted that Great Basin had briefly mentioned, but clearly expressed, its concerns about groundwater in its comment letter to the Bureau on the South Project draft EIS. The Ninth Circuit held that Great Basin's clearly-expressed concern was sufficient to put the Bureau on notice, and Great Basin had exhausted its administrative remedies.

Having held that Great Basin could raise the groundwater issue on appeal, the Ninth Circuit next addressed the merits of the claim. Great Basin had alleged that Newmont's groundwater discharges exceeded the limitations in Newmont's National Pollution Discharge Elimination System (NPDES) permit and water quality standards. Great Basin relied on a table attached to the South Project EIS that showed that groundwater pumped from the South Project had exceeded the NPDES permit limits. The Ninth Circuit reviewed the table and held that Great Basin's reliance on it was misplaced. The court explained that, while the table showed some occasional discharges beyond the NPDES limits, the discharges were generally within the permit limits. The Ninth Circuit also explained that the Bureau had found "no significant non-compliance," [[201]](#footnote-202)201 and the court held that such a finding was not arbitrary or capricious. Thus, the Ninth Circuit reversed the district court's decision as to whether Great Basin had exhausted the groundwater claim but ultimately dismissed the claim on the merits.

The Ninth Circuit next addressed Great Basin's argument that the Bureau's permitting decision violated Public Water Reserve No. 107 (PWR). [[202]](#footnote-203)202 The purpose of PWR is to prevent the monopolization of water on public land and to reserve such water for public use. Great Basin had argued **[\*702]** to the district court that the Bureau's approval of mining permits for Newmont violated PWR because the mining plan would reduce the availability of springs and waterholes in the region. The district court dismissed the claim by summary judgment because it found that Great Basin had not raised the claim before the Bureau. On appeal, the Ninth Circuit affirmed the district court grant of summary judgment, because Great Basin's commenting on its concerns about groundwater did not put the Bureau on notice of a claim under PWR. The Ninth Circuit reasoned that the connection between groundwater concerns and PWR was too attenuated, and the court affirmed the district court's finding that Great Basin had not exhausted its administrative remedies for the PWR claim. [[203]](#footnote-204)203

Next, the Ninth Circuit addressed Great Basin's claims under National Environmental Policy Act (NEPA). Great Basin had made two arguments under NEPA before the district court, which the Ninth Circuit reviewed de novo: 1) that the Bureau should have evaluated Newmont's two mining projects in a single EIS because the projects were connected actions, and 2) that the Bureau's cumulative impact analysis was inadequate. The district court dismissed both claims on the grounds that Great Basin did not raise them before the Bureau and, in the alternative, that they each failed on the merits. The Ninth Circuit held that Great Basin had exhausted its administrative remedies and could raise the issues on appeal, because Great Basin had submitted comments to the Bureau that discussed concerns about both issues. Having held that Great Basin had exhausted its administrative remedies, the Ninth Circuit then addressed the merits of each argument.

As for Great Basin's first argument, that the Bureau should have evaluated Newmont's projects in a single EIS, the Ninth Circuit held that projects were not sufficiently connected so as to require two EISs. NEPA requires that connected actions be evaluated in a single EIS, because such a requirement "prevents an agency from dividing a project into multiple "actions,' each of which individually has an insignificant environmental impact, but which collectively have a substantial impact." [[204]](#footnote-205)204 The Ninth Circuit applied an "independent utility" [[205]](#footnote-206)205 test to determine whether Newmont's two mining projects were so connected that the Bureau should have evaluated them in a single EIS. Under this test "when one of the projects might reasonably have been completed without the existence of the other, the two projects have independent utility and are not "connected' for **[\*703]** NEPA's purposes." [[206]](#footnote-207)206 Great Basin argued that Newmont's projects were connected because Leeville's ore was processed at a facility in the South Project. The Ninth Circuit rejected the sufficiency of this fact to show the projects were connected, because the Leeville draft EIS specifically stated that the South Project's facility could process Leeville's ore without any modifications. Thus, although South Project was undergoing modifications generally, none of these modifications affected the facility that was to process Leeville's ore. The Ninth Circuit concluded that, although Great Basin had exhausted its administrative remedies with respect to this claim, the claim ultimately failed because Great Basin had presented insufficient evidence to show the two projects were interdependent.

The Ninth Circuit, however, agreed with Great Basin's second claim under NEPA, that the Bureau's cumulative impact analysis was inadequate. Under NEPA, "proper consideration of the cumulative impacts of a project requires some quantified or detailed information; general statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided." [[207]](#footnote-208)207 An EIS "must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and difference between the projects, are thought to have impacted the environment." [[208]](#footnote-209)208 Similarly, conclusions without supporting data do not fulfill NEPA's requirement unless there is some explanation for why such data is not provided. [[209]](#footnote-210)209 The Ninth Circuit explained that, although the South Project EIS made conclusions regarding air toxics and hazardous wastes from the other mines, it did not discuss the relative contribution of each mine in the area or provide any objective data to support its conclusions. With regard to the Leeville EIS, the court specifically noted "the analysis of cumulative impacts on air is only five sentences long and includes no mine-specific or cumulative data … ." [[210]](#footnote-211)210 The court also agreed with Great Basin that the Leeville EIS contained no discussion of the effects of sludge or hazardous waste disposal. The Bureau argued that it did not need to examine sludge, because the toxicity of sludge had not been determined, but the court responded that allowing such an argument "would vitiate the Bureau's duty to take a "hard look' at the cumulative impacts of the action." [[211]](#footnote-212)211 Thus, the Ninth Circuit held that the Bureau's cumulative impacts analyses in both EISs were deficient and therefore reversed the district court.

The Ninth Circuit next discussed and rejected Great Basin's numerous arguments regarding the financial assurances that the Bureau had set for Newmont. In order to meet the statutory requirement, such financial **[\*704]** assurances "must cover the estimated costs as if [the Bureau] were to contract with a third party to reclaim [the] operations according to the reclamation plan … ." [[212]](#footnote-213)212 The district court rejected Great Basin's argument that the Bureau's decision to allow Newmont to bond the South Project in phases was arbitrary and capricious. On appeal, Great Basin argued that the Bureau was required to calculate the full cost of reclamation before approving a bond for the first phase of the operation, but the Court disagreed, explaining that the Bureau was only required to "obtain a financial guarantee before permitting." [[213]](#footnote-214)213 Great Basin also argued, relying on reports from a consultant, that the Bureau's calculation of the bond amount was "grossly inadequate" [[214]](#footnote-215)214 but the Ninth Circuit rejected this argument as well, reasoning that the Bureau was entitled to rely on its own experts and therefore it had not acted arbitrarily or capriciously. Lastly, Great Basin argued that the Bureau should have required Newmont to post a proper financial instrument rather than a corporate guarantee, but the court explained that this argument failed as a matter of law. The court explained that the regulatory prohibition on corporate guarantees [[215]](#footnote-216)215 does not apply to corporate guarantees in effect before a certain date, and Newmont's bond referred to corporate guarantees that were in effect prior to that date.

Lastly, the court reviewed Great Basin's argument that the district court should have admitted a document into the record even though Great Basin had submitted it after the deadline. Courts are generally limited to the agency records and cannot admit additional evidence except in "limited circumstances." [[216]](#footnote-217)216 The document Great Basin submitted was a notice from the Nevada Division of Environmental Protection (NDEP), and it demonstrated that NDEP and Newmont both considered the South Project, Leeville, and another Newmont mine to be a single project for permitting purposes. The district court refused to admit the document or take judicial notice of the facts contained in it because the court found that Great Basin had not shown that the NDEP's criteria were relevant to a NEPA analysis. The Ninth Circuit reviewed for abuse of discretion and affirmed the district court, because the Bureau had not relied on the document, the document did not demonstrate bad faith, and the document was not necessary to explain technical terms.

**[\*705]** Judge Thomas wrote separately, concurring in part and dissenting in part. He agreed with the majority that the Bureau's cumulative impact analysis was insufficient under NEPA, but he disagreed with the majority's holding that the South Project and Leeville were not connected under the independent utility test. Judge Thomas opined that the South Project was essential to Leeville because "it would be not merely unwise, but also entirely irrational to proceed with the mining of Leeville in the absence of available processing facilities." [[217]](#footnote-218)217 Thus, Judge Thomas concurred with the majority's decision as to the cumulative impacts analysis, but he disagreed with the majority's holding that Newmont's two mining projects did not require a single EIS.

To summarize, the Ninth Circuit reversed the district court on the issue of whether Great Basin had exhausted its claims under the CWA but ultimately rejected those claims on the merits. As for NEPA, the Ninth Circuit reversed the district court's holding that the Bureau had conducted an adequate cumulative impact analysis but affirmed the district court's finding that Newmont's two mining projects were not interdependent. The Ninth Circuit also rejected Great Basin's claims concerning the Bureau's bonding calculation as well as its claims under PWR, and the court held that the district court did not abuse its discretion in refusing to admit an extra-record document that Great Basin had submitted after the deadline for filing extra-record documents.

7. Northern Alaska Environmental Center v. Kempthorne, 457 F.3d 969 (9th Cir. 2006).

Various environmental organizations appealed a district court's grant of summary judgment upholding the adequacy under the National Environmental Policy Act (NEPA) [[218]](#footnote-219)218 and the Endangered Species Act (ESA) [[219]](#footnote-220)219 of a Final Environmental Impact Statement (FEIS) prepared by the Bureau of Land Management (BLM) in connection to its plan to offer long term gas and ***oil*** leases in Alaska's Northwest Planning Area (NWPA). The Ninth Circuit affirmed the summary judgment, holding that the FEIS violated neither NEPA nor the ESA.

The NWPA is part of the 23.6 million-acre National Petroleum Reserve-Alaska (NPR-A). Congress lifted the prohibition on petroleum development in the NPR-A in 1980. [[220]](#footnote-221)220 In 1998, BLM opened 87% of the NPR-A's Northeast Planning Area to ***oil*** and gas leasing. The NWPA consists of 8.8 million acres to the west of the Northeast Planning Area and is an important wildlife and vegetation habitat. BLM is now in the early stages of planning petroleum development in the NWPA.

**[\*706]** An Alaskan district court held that BLM's FEIS was adequate under NEPA and the ESA, granting summary judgment to the government. [[221]](#footnote-222)221 Plaintiffs appealed. The Ninth Circuit reviews district court grants of summary judgment de novo. [[222]](#footnote-223)222 In considering substantive agency actions with respect to NEPA, the Ninth Circuit inquires whether, under the Administrative Procedure Act (APA), [[223]](#footnote-224)223 the agency's action was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." [[224]](#footnote-225)224 The court defers to an agency's decision that is "fully informed and well-considered." [[225]](#footnote-226)225 The plaintiffs alleged that BLM's FEIS violated NEPA by inadequately performing site-specific analysis and by failing to consider reasonable alternatives, mitigating measures, and cumulative impacts of reasonably foreseeable actions. Plaintiffs also alleged that BLM violated the ESA by employing an insufficient Biological Opinion (BiOp) in formulating its FEIS.

The Ninth Circuit began by addressing plaintiffs' argument that BLM's FEIS failed to adequately perform site-specific analysis of the environmental impact of the ***oil*** and gas leases in the NWPA. NEPA requires such analysis if a federal agency has made an "irretrievable commitment of resources" to a project. [[226]](#footnote-227)226 Plaintiffs argued that NEPA required BLM to perform site-specific analysis of the environmental impact of exploration and development on each of the 488 parcels where exploratory drilling and development could occur within the NWPA. The court reasoned, however, that before lessees began exploring for ***oil*** and gas, the government could not possibly determine which parcels would be suited for further exploratory work and development, and therefore require a site-specific analysis. In order to give effect to Congress's intent, not only as expressed in NEPA but also as indicated in the 1980 act removing the prohibition on petroleum exploration in the NPR-A, the court held that the FEIS was adequate because it considered "hypothetical situations that represented the spectrum of foreseeable results." [[227]](#footnote-228)227 The FEIS analyzed two hypothetical situations, one involving the lease of half of the available parcels for exploration but no actual development, and the other involving the discovery and development of all resources available. The court recognized that in order to open the land for development, as Congress requires, a multi-stage lease process would be necessary; it would frustrate development, and therefore the wishes of Congress, if the court required BLM to determine the environmental impact of all stages of development at the exploration stage, during which it is impossible to determine future impact on specific parcels. **[\*707]** The court distinguished Conner v. Burford, [[228]](#footnote-229)228 which did not discuss the requisite degree of specificity in an EIS, only whether one needed to be done at all. The court also noted the inherent uncertainty in multi-stage projects. [[229]](#footnote-230)229 While holding that the analysis in the FEIS at issue did not violate the APA, the Ninth Circuit maintained that challenges to the EIS at such an early stage are generally permissible. The court stressed that NEPA would apply to all future stages of development, so that later development plans would be subject to further review. [[230]](#footnote-231)230

Next, the Ninth Circuit addressed plaintiffs' allegation that BLM violated NEPA by not considering a wide enough array of alternatives in the FEIS [[231]](#footnote-232)231 and failing to include the "Audubon Alternative." [[232]](#footnote-233)232 The court indicated that an agency's consideration of alternatives under NEPA "is sufficient if it considers an appropriate range of alternatives, even if it does not consider every available alternative." [[233]](#footnote-234)233 Therefore, agencies need not consider alternatives at odds "with the basic policy objectives for the management of the area." [[234]](#footnote-235)234 Plaintiffs argued that the FEIS was inadequate because it failed to consider alternatives, such as the Audubon Alternative, that called for moderate development (as opposed to full development or no development). The court concluded that BLM's Preferred Alternative actually constituted moderate development because, although it makes 96% of the NWPA available for ***oil*** and gas leasing, it included restrictions on leases. The court pointed out that BLM incorporated parts of the Audubon Alternative in its Preferred Alternative and provided adequate reasons for eliminating the other parts as inconsistent with the NWPA project. [[235]](#footnote-236)235

The Ninth Circuit next addressed plaintiffs' assertion that the EIS violated NEPA by failing to adequately discuss mitigating measures. Plaintiffs argued that the EIS did not sufficiently analyze the effectiveness of its mitigation measures. The court provided that a valid EIS need only contain "a reasonably complete discussion of possible mitigation measures," and demonstrate "that environmental consequences have been fairly evaluated." [[236]](#footnote-237)236 The court reasoned that because the extent of development and consequent future environmental impacts are uncertain, BLM's lease stipulations and Required Operating Procedures that imposed pre-application requirements were sufficient to meet NEPA's requirements.

**[\*708]** Next, the Ninth Circuit addressed plaintiffs' allegation that the EIS violated NEPA by failing to address the cumulative impacts of reasonably foreseeable actions. Plaintiffs argued that the EIS should have considered the proposal within a BLM Notice of Intent to remove certain wildlife protections in an area adjacent to the NWPA, which would modify that adjacent area's EIS. The court noted that NEPA requires a FEIS to address the cumulative impacts of reasonably foreseeable future actions, [[237]](#footnote-238)237 and provided that proposed actions [[238]](#footnote-239)238 and actions described in a Notice of Intent [[239]](#footnote-240)239 are both reasonably foreseeable under NEPA. The Ninth Circuit provided that BLM's Notice of Intent had the effect of judicially estopping the agency from refusing to consider all impacts in the NWPA resulting from changes to the adjacent area's EIS. [[240]](#footnote-241)240 The court indicated that BLM should consider the cumulative impacts of the changes detailed in the Notice of Intent later in the NWPA development process.

Finally, the Ninth Circuit reached plaintiffs' claims under the ESA. Plaintiffs argued that BLM and the United States Fish and Wildlife Service (FWS) violated the ESA by relying on improper assumptions in considering the whole BLM action and by ignoring the irregular distribution of two endangered bird species. The court noted that the ESA "requires the Secretary of the Interior to ensure that an action of a federal agency is not likely to jeopardize the continued existence of any … endangered species," [[241]](#footnote-242)241 using "the best scientific and commercial data available." [[242]](#footnote-243)242 Due to the lack of information about specific future activities, the Ninth Circuit held that FWS validly relied on projections of potential development activity. [[243]](#footnote-244)243 The court noted that BLM must reinitiate consultation with FWS if the BiOp's assumptions later prove inaccurate. [[244]](#footnote-245)244

In conclusion, the Ninth Circuit upheld the district court's grant of summary judgment to BLM, holding that BLM's FEIS violated neither NEPA nor the ESA.

**[\*709]**

8. San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission, 449 F.3d 1016 (9th Cir. 2006).

The San Luis Obispo Mothers, the Sierra Club, and Peg Pinard (collectively Petitioners) petitioned the Ninth Circuit to review a Nuclear Regulatory Commission (NRC or Commission) denial of a hearing request regarding Pacific Gas and Electric's (PG&E) license application to build an Interim Spent Fuel Storage Installation at its Diablo Canyon power plant. Petitioners claimed that PG&E violated provisions of the National Environmental Policy Act (NEPA), [[245]](#footnote-246)245 the Atomic Energy Act (AEA), [[246]](#footnote-247)246 and the Administrative Procedure Act (APA). [[247]](#footnote-248)247 The Ninth Circuit held that 1) NRC did not violate the AEA when it denied the two hearing petitions because neither the statute nor the regulations mandate the NRC to hold a hearing to determine if NEPA requires the NRC to consider the environmental impact of a terrorist attack; 2) NRC's use of its prior decisions to determine that NEPA does not require NRC to consider the environmental impacts of terrorism did not violate the notice and comment requirements of the APA; and 3) the factors NRC relied on to conclude that it did not have to consider the environmental impact of terrorism under NEPA were unreasonable. The Ninth Circuit thus determined that the environmental assessment was inadequate. The court denied the petition on the issues raised regarding the AEA and the APA, granted the petition in regards to the NEPA issue, and remanded the case back to the agency for further proceedings.

NEPA requires federal agencies to consider the environmental impacts of agency actions by imposing procedural obligations [[248]](#footnote-249)248 that consist of an Environmental Impact Statement (EIS) or, in the alternative, an Environmental Assessment (EA). An EIS is unnecessary if, after conducting a more limited EA, the agency finds that the agency action will not significantly impact the environment. In such instances, the agency issues a "Finding of No Significant Impact" (FONSI), along with an explanation of why the proposed action will not have a significant impact on the environment. [[249]](#footnote-250)249

The AEA addresses the need for safety standards in the licensing and operation of nuclear facilities by establishing the procedural requirements that NRC must follow for licensing decisions. To issue a license, NRC must ensure that the license and operation of the facility is in line with national defense and security and adequately protects public health and safety. [[250]](#footnote-251)250 The AEA and the APA allow interested persons to petition for hearings **[\*710]** addressing material issues in the NRC licensing proceeding. [[251]](#footnote-252)251 Regulations dictate that the first hearing be held before the Atomic Safety and Licensing Board (Licensing Board), [[252]](#footnote-253)252 which makes findings and issues the agency's initial decision. [[253]](#footnote-254)253 A party can petition NRC to review the Licensing Board's decision [[254]](#footnote-255)254 and, if the NRC grants the petition for review, NRC identifies the issues for review and the parties included in the review process. [[255]](#footnote-256)255 After the review, NRC issues a final decision. [[256]](#footnote-257)256 Once NRC issues its final decision, a party can petition a court of appeals to review the final decision. [[257]](#footnote-258)257

On December 21, 2001, PG&E applied to NRC for a permit to build and operate a Storage Installation at its Diablo Canyon facility. The Storage Installation would provide PG&E with on-site storage for spent fuel created from operating two nuclear reactors. The additional storage would enable PG&E to continue operating the reactors, as it projected the current spent fuel storage would reach capacity in the current year. Thus, if PG&E did not build the additional storage, the reactors would no longer be able to operate. The proposed Storage Installation would consist of 140 stainless steel canisters that, over the course of more than sixteen years, would each be filled with radioactive waste, welded shut, and stored in concrete, on concrete pads.

On April 22, 2002, NRC issued a Notice of Opportunity for Hearing. [[258]](#footnote-259)258 A hearing request must include contentions that the interested party wants addressed at the public hearing and NRC will only grant the hearing request if the petitioner has standing and has included at least one admissible contention. [[259]](#footnote-260)259 On July 19, 2002, Petitioners submitted a hearing request and a petition to intervene, setting out five technical and three environmental contentions. The Licensing Board determined that a contention regarding PG&E's financial qualifications was admissible. [[260]](#footnote-261)260 While the Licensing Board resolved that two of the environmental contentions were inadmissible (the contention alleging the "failure to address environmental impacts of terrorists or other acts of malice or insanity" and the contention **[\*711]** "dealing with the failure to evaluate environmental impacts of transportation of radioactive materials"), [[261]](#footnote-262)261 in the final ruling to NRC, the Licensing Board stated that the two environmental contentions were admissible "in light of the Commission's ongoing "top to bottom' review of the agency's safeguards and physical security programs." [[262]](#footnote-263)262

NRC adopted the Licensing Board's determination that the two environmental contentions dealing with terrorism were not admissible, [[263]](#footnote-264)263 but based its decision on four previous NRC decisions that all held that NEPA does not mandate a terrorism review. [[264]](#footnote-265)264 NRC stated that its decision in the present case was based on its understanding of the requirements of NEPA, the reality of storing spent fuel, and Congress's policy of having nuclear reactor facilities store spent fuel on-site. NRC also noted that Diablo Canyon has been, and will continue, storing spent fuel on-site whether or not it is allowed to construct an additional storage facility. [[265]](#footnote-266)265

In September 2002, prior to NRC's decision on the first petition, Petitioners submitted a second petition, asking NRC to suspend the Storage Installation licensing proceeding until there had been a thorough review of the sufficiency of the entire Diablo Canyon complex's protections against terrorist attacks and acts of malice or insanity. Petitioners argued that a second petition was necessary because regulations prevented them from bringing up issues concerning the entire complex's safety and security measures, as well as its emergency plan in the first petition. [[266]](#footnote-267)266 Petitioners were careful to describe the second petition as a necessary action to ensure that the licensing decision complied with the AEA, and not as a rulemaking or enforcement action.

NRC denied the second petition, which it treated as a general motion, [[267]](#footnote-268)267 on the grounds that by continuing to allow the operation of nuclear plants after the September 11, 2001 terrorist attacks, the Commission had indicated implicitly that the further operation of nuclear facilities posed no risk to the public health or national defense. Additionally, NRC reasoned that because it had already begun a review of the safety and security measures at the Diablo Canyon facility, it was not necessary to stop the licensing proceeding to consider Petitioner's terrorism concerns.

**[\*712]** NRC denied the two petitions for review of the Licensing Board's determinations to reject Petitioner's challenges to the Storage Installation. [[268]](#footnote-269)268 As NRC's denial of the petition is its final judgment, it is reviewable by the Ninth Circuit. [[269]](#footnote-270)269

In October 2003, the Spent Fuel Office, a division of NRC's Office of Material Safety and Safeguards, made public the EA for the Diablo Canyon Storage Installation. NRC determined that the construction, operation, and decommissioning of the Storage Installation would not have a significant impact on the environment, thus warranting a FONSI. The Ninth Circuit noted that within the EA, NRC discussed terrorist attacks. In response to a comment received based on a prior draft of the EA, NRC stated that "the Commission has determined that an NRC environmental review is not the appropriate forum for the consideration of terrorist attacks" and that the security review is the appropriate forum for such concerns. [[270]](#footnote-271)270

Petitioners alleged that NRC violated the AEA, the APA, and NEPA when it denied their petitions. Specifically, Petitioners first alleged that NRC violated the AEA by denying Petitioners' hearing request to determine if NEPA mandates NRC to consider the environmental impact of a terrorist attack on a storage facility. Secondly, Petitioners alleged that NRC violated the AEA's hearing requirements when NRC denied Petitioners' request for a hearing regarding security measures for the entire Diablo Canyon facility after the September eleventh terrorist attacks. Thirdly, Petitioners alleged that NRC violated the APA's notice and comment requirement when the Commission used its own prior decisions to determine the outcome of the present case. Finally, Petitioners alleged that NRC violated NEPA by refusing to consider the possible environmental impacts of terrorist attacks. The Ninth Circuit addressed in turn each of the allegations and sub-issues raised.

The Ninth Circuit first addressed Petitioner's AEA arguments: that 1) NRC violated regulations promulgated to implement the AEA concerning filing and deciding petitions; 2) NRC violated the hearing requirements of the AEA when NRC denied Petitioners' request for a hearing as to whether NEPA required NRC to consider the environmental impacts of a terrorist attack on the Storage Installation; and 3) NRC violated the AEA hearing requirements when it denied Petitioners' hearing request for a post-September eleventh review of the security procedures for the entire Diablo Canyon facility.

The Ninth Circuit determined that NRC did not violate the AEA when it rejected Petitioners' allegations without explaining each of the allegations individually. The court pointed out that while it is true that NRC did not state whether Petitioners had met the statutory standard for a hearing, [[271]](#footnote-272)271 the **[\*713]** regulations do not impose strict requirements on NRC to explain its decisions. The court noted that the only regulatory requirement of NRC is for it to issue a "timely decision." [[272]](#footnote-273)272 Thus, the Ninth Circuit rejected Petitioners' argument because Petitioners did not allege that NRC violated an actual requirement of the AEA's implementing regulations.

The court then considered whether NRC violated the AEA when it denied Petitioners' request for a hearing about whether NEPA required a hearing to consider the environmental impact of possible terrorist threats. The crux of Petitioners' argument was that NRC's reliance on earlier decisions determining that NEPA does not require the NRC to consider the environmental impacts of terrorist attacks was improper; the Petitioners did not challenge the basis or merits of the earlier decisions. In Sierra Club v. Nuclear Regulatory Commission, [[273]](#footnote-274)273 NRC had denied Petitioners' contentions, but had then addressed the merits of the contentions. [[274]](#footnote-275)274 The court determined that because Petitioners did not challenge the validity of the earlier NRC decisions, Sierra Club was not applicable to the present case. The court distinguished Sierra Club from the present case by pointing out that in the present case, NRC did not address the merits of the contentions, but applied past decisions to determine if the contentions were admissible. The Ninth Circuit determined that this did not violate the AEA and noted that if it concluded differently, it would have burdened the agency with granting hearings on issues that it had already addressed.

The Ninth Circuit then considered whether NRC violated the AEA when it denied Petitioners' second petition regarding the overall security of the Diablo Canyon facility. Petitioners argued that the AEA mandates NRC to grant petitions for hearing if there is an issue of fact. Relying on Union of Concerned Scientists v. Nuclear Regulatory Commission, [[275]](#footnote-276)275 Petitioners' claimed that because NRC did not grant the petition for a hearing about the security of the entire complex, NRC violated the AEA. In Union of Concerned Scientists, the Court of Appeals for the District of Columbia held that an agency cannot rule if the ruling would eliminate an issue of fact; [[276]](#footnote-277)276 however, an agency is not required to grant a petition for a hearing, it only has to consider the petition. The Ninth Circuit noted that NRC did not refute the idea that the Diablo Canyon facility's security may need to be improved; instead the agency determined that a licensing proceeding was not the appropriate place to address this issue. NRC directed the Petitioners to use other avenues to address the issue such as rulemaking or a current hearing **[\*714]** before the Licensing Board. Petitioners responded to NRC's suggestions by claiming that they are "illusory" and that the rejection denied them the ability to take part in determining the appropriate post-September eleventh security procedures for the entire facility. Further, Petitioners claimed that the opportunity to participate in rulemaking would only take place after there had been a review of the security measures in place at the Diablo Canyon facility, so filing a rulemaking petition would be useless. The Ninth Circuit rejected this argument, stating that because Petitioners had not availed themselves of the rulemaking procedures, they were unable to fault NRC for not initiating rulemaking that was not requested. The court also dismissed Petitioners' claim that the use of a hearing before the Licensing Board was "illusory" because Petitioners were trying to use the licensing proceedings to attack the security measures in place at the entire Diablo Canyon facility. Lastly, the court noted that the fact that the Licensing Board cannot hear claims that challenge NRC rules or regulations does not equate to a denial of forum for Petitioners.

Next, the Ninth Circuit addressed whether NRC violated the APA's notice and comment requirements when it relied on prior NRC decisions to determine the admissibility of the contentions in the present case. Petitioners argued that NRC's reliance on past decisions was essentially an announcement of a NRC policy to refuse to consider the environmental impacts of terrorist attacks. Relying on Mada-Luna v. Fitzpartick, [[277]](#footnote-278)277 Petitioners claimed that an agency cannot issue a determination based on facts that amount to an agency policy without holding a public hearing. [[278]](#footnote-279)278 The Ninth Circuit acknowledged the accuracy of this claim, but pointed out that the determination that NEPA does not require an agency to consider the environmental impacts of a terrorist attack is a legal determination, not a factual determination. To announce a legal norm, NRC is not required to follow the notice and comment provisions of the APA, [[279]](#footnote-280)279 but it can employ adjudication. [[280]](#footnote-281)280 Therefore, the court concluded that it was reasonable for NRC to use prior cases that addressed similar issues and that NRC did not violate the notice and comment requirements of the APA.

The Ninth Circuit then turned to the final issue: whether NEPA requires an agency to take into account the environmental impacts of a terrorist attack. The court began by noting that the agency's determination would be reviewed under the reasonableness standard. [[281]](#footnote-282)281 NRC, in reliance on its prior **[\*715]** decision in Private Fuel Storage L.L.C., [[282]](#footnote-283)282 determined that NEPA does not require the NRC to consider the environmental impact of terrorist attacks. In Private Fuel Storage, the State of Utah alleged that the terrorist attacks of September eleventh had significantly changed the circumstances under which the Licensing Board had rejected past arguments about the threat of terrorism because the attacks demonstrated that a terrorist attack was both more likely and more dangerous. [[283]](#footnote-284)283 NRC decided that even after September eleventh, NEPA does not require the agency to consider the environmental impacts of terrorism, determining that NEPA was the wrong forum to address such concerns. [[284]](#footnote-285)284 In rendering its decision, NRC outlined four reasons why NEPA is not the appropriate place to consider the impacts of terrorism:

(1) the possibility of a terrorist attack is far too removed from the natural or expected consequences of agency action; (2) because the risk of a terrorist attack cannot be determined, the analysis is likely to be meaningless; (3) NEPA does not require a "worst-case" analysis; and (4) NEPA's public process is not an appropriate forum for sensitive security issues. [[285]](#footnote-286)285

The Ninth Circuit addressed each of these factors in turn.

The court first considered the factor regarding the remoteness of terrorist attacks. NEPA requires that agencies consider the environmental impact of actions that "significantly affect" the environment. [[286]](#footnote-287)286 Thus, the court sought to determine what actions "significantly affect" the environment and considered a case provided by the Commission, Metropolitan Edison Co. v. People Against Nuclear Energy. [[287]](#footnote-288)287 In that case, the Supreme Court stated that the agency "must look to the relationship between that effect and the change in the physical environment caused by the major federal action at issue" and there must be a "reasonably close causal relationship … like the familiar doctrine of proximate cause from tort law." [[288]](#footnote-289)288 The Supreme Court stated that because NEPA is an environmental statute, the analysis had to look at the closeness between the change in the environment from the agency action and the effect. [[289]](#footnote-290)289 The Ninth Circuit distinguished Metropolitan Edison from the present cases on the grounds that in Metropolitan Edison, the petitioners argued that NEPA required the NRC to consider the psychological impact of reopening Three **[\*716]** Mile Island nuclear reactors, and, therefore, the causation analysis was not appropriate for the case. The Ninth Circuit then looked to NoGwen Alliance v. Aldridge [[290]](#footnote-291)290 for the proper analysis. In NoGwen Alliance, the plaintiffs asserted that NEPA mandated the Air Force to consider nuclear war in the implementation of the Ground Wave Emergency Network (GWEN). In that case, the Ninth Circuit held that connection between the construction of the network and nuclear war was too attenuated to be included a NEPA assessment. [[291]](#footnote-292)291

Relying on these two cases, the court outlined a causation chain for determining whether an agency action "significantly affects" the environment: "(1) a major federal action; (2) a change in the physical environment; and (3) the effect." [[292]](#footnote-293)292 The Ninth Circuit noted that in Metropolitan Edison the issue was the connection between the second and third events and the Supreme Court pointed out that a court considering the relationship between the first and second event would be faced with a completely different case. [[293]](#footnote-294)293 The Ninth Circuit then looked to NoGwen, where the court addressed the link between the first and second events. In NoGwen, the Ninth Circuit held that because the court was looking at a different relationship between events, the agency had to consider the relationship between the agency action and the possible effect on the environment. [[294]](#footnote-295)294 In NoGwen, the Ninth Circuit had drawn from its decision in Warm Springs Dam Task Force v. Gribble, [[295]](#footnote-296)295 where the court held that an EIS did not need to address "remote and highly speculative consequences." [[296]](#footnote-297)296 The court applied the holding from Warm Springs to the facts in NoGwen and determined that, under NEPA, NRC did not need to consider the threat of nuclear war on the GWEN facility because the threat was "remote and highly speculative." [[297]](#footnote-298)297

The Ninth Circuit then analogized the present case to NoGwen, stating that both cases deal with the relationship between the first and second events. Thus, the court identified the proper analysis as whether terrorist attacks are too "remote and highly speculative" to be required by NEPA. The Ninth Circuit noted that NRC did not address Petitioners' arguments that the Storage Installation would increase the risk of a terrorist attack; instead, NRC stated that as a matter of law, the possibility of an attack was remote and speculative. [[298]](#footnote-299)298 Thus, the court determined that it was unreasonable for NRC to dismiss the Petitioners' claims as being "too remote and highly speculative" because it did not address them. The court supported its determination by pointing out that NRC's contention that the possibility of a **[\*717]** terrorist attack was remote or speculative was contrary to the government's actions to prepare for a terrorist attack on nuclear facilities. Additionally, the Ninth Circuit recognized NRC had taken steps to prevent a terrorist attack on a nuclear facility. [[299]](#footnote-300)299 Unable to resolve NRC's position that a terrorist attack was too remote to require a NEPA assessment and NRC's efforts to improve security at facilities to guard against a terrorist attack, the Ninth Circuit stated that NRC must make decisions consistent with its policies under the rule of reasonableness. Thus, the court concluded that, based on the policy goals of NEPA and the rule of reasonableness, the possibility of a terrorist attack on the Diablo Canyon facility was not too remote or speculative to be outside of NEPA's requirements.

The court then considered the second factor from Private Fuel Storage: the analysis is futile because the risk of a terrorist attack cannot be determined. [[300]](#footnote-301)300 In addressing this point, the Ninth Circuit explained that the fact that an event is not quantifiable does not mean it cannot be considered under NEPA. The court noted that it is possible to do low probability-high consequence analysis (which NRC currently does in different situations) that do not require a quantifiable value for the possibility of a terrorist attack. Additionally, the court stated that NRC has approved and utilized models of analysis for events not reducible to quantifiable numbers [[301]](#footnote-302)301 and that there is nothing within NEPA or any other statute that allows an agency to take a possible environmental consequence out of a NEPA analysis merely by stating that the risk cannot be quantified. [[302]](#footnote-303)302 The Ninth Circuit also noted that NRC did not prove that the risk of a terrorist attack was unquantifiable; NRC only stated that the risk was unquantifiable. The Ninth Circuit concluded that NEPA does not require the risk to be quantifiable to be considered under the statute, and if NEPA did require that the risk be quantifiable, NRC failed to prove that a terrorist attack cannot be quantified.

The Ninth Circuit then considered the third factor from Private Fuel Storage: NEPA does not require a "worst-case" analysis. The court initially noted that an assessment of the environmental impact of terrorism does not equal worst-case scenario analysis. While prior regulations implementing NEPA required a worst-case analysis, current regulations do not, but instead require an agency to manage uncertainties by submitting reliable scientific evidence that is "relevant to evaluating the reasonable foreseeable significant adverse impacts on the human environment, and … the agency's evaluation of such impacts based on theoretical approaches or research methods generally accepted in the scientific community." [[303]](#footnote-304)303 This regulation **[\*718]** applies to events that have a low probability of occurring, but if they occur, cause great consequences. [[304]](#footnote-305)304 Thus, the Ninth Circuit determined that while NRC was right in its contention that NEPA does not require a worst-case analysis, the Commission was wrong in equating a worst-case analysis with an analysis of the environmental impact of terrorism. The court looked to a memorandum issued by the Council on Environmental Quality (CEQ) to determine what was encompassed in a worst-case analysis [[305]](#footnote-306)305 and stated that NRC incorrectly labeled a terrorist attack a worst-case scenario because of the low probability of it occurring. The Ninth Circuit determined that because CEQ included high and low probability events in their discussion of a worst-case analysis, the requirement really focused on the possible outcome of the event, not the probability of the event occurring. Therefore, the court concluded that by asking NRC to look at the environmental impacts of a terrorist attack on the Storage Installation, Petitioners did not ask NRC to consider worst-case scenarios in its analysis.

Finally, the court considered the fourth factor from Private Fuel Storage which is that NEPA is not the right forum for sensitive security issues. The court began by noting that while NEPA requirements are not absolute and must be applied in conjunction with other programs and statutes, there is no support for the argument that NEPA requirements are trumped when security concerns exist. The court looked to Weinberger v. Catholic Action of Hawaii [[306]](#footnote-307)306 for the proposition that "security considerations may permit or require modification of some of the NEPA procedures … [but that] sensitive security issues [do not] result in some kind of NEPA waiver." [[307]](#footnote-308)307 The court stated that NEPA's requirements must be measured in light of the twin aims of the statute: making sure that agencies consider the relevant information about the environmental impacts of an action and making sure that the public has an opportunity to participate in the agency decision-making and has access to the information. [[308]](#footnote-309)308 Thus, the sensitivity of the information should not prevent the public from submitting information to the agency, even if the public was unable to view the information. The court turned to NoGwen for the statement that "there is no national defense exception to NEPA … [the] agency … must carry out its NEPA mandate to the fullest extent possible and this mandate includes weighing the environmental costs of the project even though the project has serious security implications." [[309]](#footnote-310)309

**[\*719]** The Ninth Circuit concluded that 1) NRC did not violate the AEA when it denied the two hearing petitions because neither the statute nor the regulations mandate the NRC to hold a hearing to determine if NEPA requires the NRC to consider the environmental impact of a terrorist attack; 2) NRC's use of its prior decisions to determine that NEPA does not require NRC to consider the environmental impacts of terrorism did not violate the notice and comment requirements of the APA; and 3) the factors NRC relied on to conclude that it did not have to consider the environmental impact of terrorism under NEPA were unreasonable and the environmental assessment was therefore inadequate.

9. Environmental Protection Information Center v. United States Forest Service, 451 F.3d 1005 (9th Cir. 2006).

The Environmental Protection Information Center (EPIC) sued the United States Forest Service (USFS) for failing to prepare an Environmental Impact Statement (EIS) under the National Environmental Policy Act of 1969 (NEPA) [[310]](#footnote-311)310 and for preparing an inadequate Environmental Assessment (EA) for the proposed Knob Timber Sale in the Klamath National Forest. In addition, EPIC argued that the project violated the National Forest Management Act (NFMA). [[311]](#footnote-312)311 EPIC claimed 1) an EIS should have been prepared or, alternatively, the EA was inadequate because the project was likely to significantly affect the northern spotted owl and its critical habitat; 2) an EIS was necessary because the project was likely to have significant, short-term, and "uncertain" adverse impacts on the watershed;" 3) the EA was inadequate because it failed to consider the cumulative impact of the Meteor Timber Sale on the project; 4) the EA was inadequate because USFS relied on mitigation measures in its EA to downplay the adverse effects of the project; 5) the EA was inadequate because it did not consider a reasonable range of alternatives; 6) the EA was inadequate because it failed to disclose short-term increases in fire risk and did not demonstrate how the project would meet the overall goal of reduced fire risk; and 7) USFS failed to meet its duty under the NFMA to "provide for diversity of plant and animal communities." [[312]](#footnote-313)312 The Ninth Circuit denied all of EPIC's claims and affirmed the district court's award of summary judgment to USFS.

In October 2002, USFS issued an EA for the Knob Timber Sale (the Project), a vegetation management project in which 578 acres of timber would be harvested from twenty-seven units in the Salmon River Ranger District of the Klamath National Forest. The purpose of the project was "to maintain stand health by leading stands into a resilient condition where they can provide a sustained yield of wood products and reduce their risk to **[\*720]** potential catastrophic fire." [[313]](#footnote-314)313 After formal consultations with the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (FWS), [[314]](#footnote-315)314 USFS identified two key issues in its final EA: 1) the Project's effects on "critical habitat" for the northern spotted owl, a threatened species, and 2) the effects on the watershed from erosion and slope failure that might be triggered by timber harvest, fuel reduction, and road activities. USFS then issued a Finding of No Significant Impact (FONSI) and selected the alternative it believed had the best potential to achieve the Project's purposes, as well as long-term benefits and minor short-term adverse effects for the northern spotted owl and watershed health.

EPIC filed suit in district court claiming that USFS violated NEPA by failing to prepare a required EIS and by preparing an inadequate EA. Further, EPIC claimed that USFS violated the NFMA. The district court granted summary judgment to USFS on all claims.

The Ninth Circuit reviewed the district court's decision de novo [[315]](#footnote-316)315 and reviewed the agency's actions under the arbitrary and capricious standard of the Administrative Procedure Act (APA). [[316]](#footnote-317)316 That standard requires the court to determine "whether the agency has taken a hard look at the consequences of its actions, based [its decision] on a consideration of the relevant factors, and provided a convincing statement of reasons to explain why a project's impacts are insignificant." [[317]](#footnote-318)317

The Ninth Circuit first reviewed the statutory background behind EPIC's NEPA claims. Under NEPA, the agency first prepares an EA. If it determines that the action will have a significant impact, [[318]](#footnote-319)318 it must prepare an EIS. [[319]](#footnote-320)319 If the agency determines that there will be no significant impact, it issues a FONSI. [[320]](#footnote-321)320 The "significance" of an action depends on the project's "context" or scope and the "intensity" or severity of the impact. [[321]](#footnote-322)321 There are ten factors for evaluating intensity, [[322]](#footnote-323)322 four of which were applicable to the case according to EPIC. The court addressed EPIC's assertion that the EA was inadequate with its analysis of the EIS.

The court then examined EPIC's argument that the Project would harm the northern spotted owl [[323]](#footnote-324)323 and its "critical habitat." [[324]](#footnote-325)324 The 578-acre Project **[\*721]** consisted of 125 acres that had been designated critical habitat and which were available for timber production as "matrix" lands under the Northwest Forest Plan (NFP). [[325]](#footnote-326)325 Of those 125 acres, the Project would remove fourteen acres of nesting habitat, degrade fifty-one acres of "high" quality nesting habitat to "moderate" quality nesting habitat, and leave the remaining sixty acres that were not suitable for nesting or roosting for dispersal habitat. EPIC's claim was based on six arguments. First, EPIC asserted that the Project affected the owl significantly because it could destroy three nesting sites and remove "most if not all" nesting habitat from two critical habitat units. The court held these effects were not significant because the agency must only consider the adverse effects on the species and not on particular individuals. [[326]](#footnote-327)326 The court held that the determination reached by FWS that the potential taking of three nests was permissible under the ESA was not arbitrary and capricious.

Second, EPIC argued that an EIS was required because the effects on the spotted owl were too uncertain. The Ninth Circuit dismissed this argument, stating that EPIC based its contention on an incomplete reading of the FWS Biological Opinion (BiOp). The BiOp stated that the distribution of the effects of the Project could not be "accurately described" without additional information. However, the BiOp went on to say density of the owls "should be roughly constant" and that, therefore, the magnitude of the overall effects "should not be substantially different" than USFS estimated. [[327]](#footnote-328)327

Third, EPIC alleged that the EA failed to disclose a concern for increased fire risk in a critical habitat unit, CA-22. The court disagreed, pointing to sections of the EA that stated that there would be short-term increased fire risk in all units which would be reduced over the long term and that the CA-22 unit already had a low fire risk that would only increase over the next five to ten years if it implemented the "no action" alternative. Therefore, the court held the EA adequately disclosed and evaluated fire risk, so that was not grounds for an EIS.

Fourth, EPIC argued that the EA did not consider habitat connectivity, which is important for dispersal habitat linking the late successional reserves (LSRs). The Ninth Circuit determined that both the EA and the underlying FWS BiOp addressed connectivity and concluded that USFS would maintain connectivity as necessary to protect the critical habitat. Therefore, the EA was not deficient and an EIS was not required.

**[\*722]** Fifth, EPIC complained that USFS improperly relied on the FWS conclusion that the project would not "jeopardize" the northern spotted owl, for the USFS is required to prepare an EIS if the Project "may adversely effect" the species. The court conceded that NEPA and the ESA have different standards, but said that USFS was not required to disregard the FWS findings. Furthermore, USFS did not rely merely on the conclusion of the BiOp, but also on its underlying analysis and other sources, when it concluded that the potential effects on spotted owls "will not be significant." Finally, that court stated that an EIS is not required for just "any impact," but only when that effect has reached a certain level of intensity. [[328]](#footnote-329)328

Sixth, and finally, EPIC relied on Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service to argue that USFS improperly relied on the LSRs to diminish the Project's impact on critical habitat. [[329]](#footnote-330)329 However, the Ninth Circuit distinguished the current case because, unlike in Gifford Pinchot where FWS treated LSRs as a substitute for critical habitat, this BiOp contains discussion of LSRs as well as "significant analysis of the Project's effect on critical habitat that is independent of the LSR discussion." [[330]](#footnote-331)330 Even if the BiOp was similarly flawed, the court held that USFS did not rely exclusively on this document or its finding of "no adverse modification." The court concluded that because USFS did not use the LSRs as a "substitute" for critical habitat, the USFS took the necessary "hard look" at the Project's effects on critical habitat and adequately explained why the impacts were not significant. Therefore, the EA was adequate and an EIS was not required.

The Ninth Circuit then turned to EPIC's three claims regarding the Project's impacts on the watershed. First, EPIC claimed that an EIS was necessary because the Project would have significant, short-term impacts that were "uncertain." EPIC had based this claim on the use of the word "immeasurable" in the EA, but the court pointed out that when read in context it meant "effects would be so negligible that they could not be measured." [[331]](#footnote-332)331 Second, EPIC asserted that the EA did not include the required "hard look" at watershed impacts, failed to include high-quality information, and focused disproportionately on long-term impacts. The Court rejected these claims, indicating that the fifteen-page analysis of watershed impacts fulfilled the hard look requirement and that the EA had a "reasoned evaluation" of short-term effects "throughout the analysis." [[332]](#footnote-333)332 Furthermore, because the EA determined that these short-term impacts would be "minor" and "negligible," no EIS was required.

Third, EPIC claimed that the EA's analysis was flawed because it did not adequately address the Project's cumulative impacts. The agency is **[\*723]** required to consider "whether the action is related to other actions with individually insignificant but cumulatively significant impacts." [[333]](#footnote-334)333 However, the Ninth Circuit determined that the EA's cumulative effect analysis was sufficient because the entire analysis was based on a "cumulative watershed effects" (CWE) model, [[334]](#footnote-335)334 and that model was applied on a project and watershed scale with "a significant amount of quantified and detailed information." Therefore, there was no need for an EIS.

The court next addressed EPIC's claim that the EA's overall analysis of cumulative impacts was flawed because USFS failed to consider the impacts of the Meteor Timber Sale. [[335]](#footnote-336)335 The agency must include in its cumulative effects analysis projects that are "reasonably foreseeable." [[336]](#footnote-337)336 The court determined that, "because the parameters of the Meteor project were unknown at the time of the EA, it was not arbitrary and capricious for [the FS] to omit the project from its cumulative [effects] analysis." Furthermore, even if the EA was flawed, the FS adequately remedied this error by discussing the Meteor project in its comment response. [[337]](#footnote-338)337

EPIC also criticized USFS's reliance on mitigation measures to minimize the adverse effects of the Project. Relying on National Parks & Conservation Association v. Babbitt (National Parks), [[338]](#footnote-339)338 EPIC argued that because "the EA provided no data supporting the efficacy of its mitigation measures[,]" an EIS was required. However, the court distinguished this case from National Parks "because instead of analyzing potential impacts … and then developing a plan to mitigate those adverse effects, the Project incorporates mitigation measures throughout the plan" and analyzes the Project's effects with those measures in place. In addition, the EA contained very specific information on how the USFS would minimize effects on wildlife or watershed and also contained monitoring provisions to ensure future compliance. These facts convinced the court that the USFS took "the requisite "hard look' at the Project's environmental consequences, and [that] it was not arbitrary and capricious" to issue the FONSI.

**[\*724]** The Ninth Circuit then rejected EPIC's complaint that the USFS failed to consider a reasonable range of alternatives. Citing an earlier decision, the court held that "an agency's obligation to consider alternatives under an EA is a lesser one than under an EIS" [[339]](#footnote-340)339 and that in this case the agency's detailed consideration of three alternatives [[340]](#footnote-341)340 and rejection of six others [[341]](#footnote-342)341 constituted a reasonable range of alternatives.

In addition, EPIC argued that the EA did not include adequate disclosures of short-term increases in fire risk and that the EA did not show that the Project would meet the goal of reducing fire risk. The court rejected both of these arguments. The EA adequately discussed the risk of fire in critical spotted owl habitat and contained a general section on fire risk, and thus "clearly disclosed both the risk and the steps that will be taken to minimize that risk." [[342]](#footnote-343)342 With regards to whether the Project would meet the agency's stated goal, the court deferred to the agency's "informed discretion" [[343]](#footnote-344)343 in the face of scientific controversy. [[344]](#footnote-345)344

EPIC also claimed that the USFS failed to comply with its NFMA obligations by improperly relying on habitat quality instead of studying the actual abundance of individual "management indicator species" (MIS). NFMA requires the USFS to "provide for diversity of plant and animal communities." [[345]](#footnote-346)345 The USFS regulations interpret this to require that "fish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area." [[346]](#footnote-347)346 MIS are used as indicators of the effect of management activities [[347]](#footnote-348)347 and therefore the USFS "prepared a site-specific assessment of the effects of the Project on habitats for sixteen designated MIS." That study concluded that there would be minor effects.

**[\*725]** As it had done in the past, [[348]](#footnote-349)348 the court endorsed this analysis of quality and quantity of habitat rather the actual MIS population, or so-called proxy on proxy methodology, "absent some indication in the record that USFS's underlying methodology is flawed." [[349]](#footnote-350)349 Here, EPIC did not allege any specific deficiency, but relied on a general statement in the Klamath Forest 2000 monitoring report about MIS monitoring difficulties. The court determined that this statement did not undermine the site-specific MIS studies and that monitoring difficulties would not make habitat-based analysis unreasonable "so long as the analysis uses all the scientific data currently available." [[350]](#footnote-351)350 Therefore, it was not arbitrary and capricious for USFS to conclude that the Project complied with NFMA and USFS regulations.

The court found that the EA included "detailed and adequate consideration of information from a wide range of sources" and that the FONSI was not arbitrary and capricious. The Ninth Circuit affirmed the district court's grant of summary judgment on the NEPA claims. The court also determined that because the record revealed no serious flaws in USFS's habitat proxy methodology, the agency complied with NFMA. The Ninth Circuit affirmed the district court's grant of summary judgment on the NFMA claims.

10. Oregon Natural Resources Council v. U.S. Bureau of Land Management, 470 F.3d 818 (9th Cir. 2006).

Plaintiffs Oregon Natural Resources Council Fund, together with Klamath Siskiyou Wildlands Center, Umpqua Watersheds, Inc., and Headwaters (collectively ONRC), appealed a district court's decision granting summary judgment in favor of the Bureau of Land Management (BLM). ONRC alleged that BLM violated the National Environmental Policy Act (NEPA) [[351]](#footnote-352)351 by conducting an insufficient Environmental Analysis (EA) **[\*726]** for the "Mr. Wilson" [[352]](#footnote-353)352 logging project (Wilson Project). The district court found that, since logging was complete, the matter was moot, and granted summary judgment in favor of BLM. On review, the Ninth Circuit reversed, with one judge dissenting. The majority held that the matter was not moot and that the EA was in fact insufficient, while the dissenting judge contended the matter was moot. The court remanded and ordered BLM to complete another EA.

The Wilson Project was located in the Glendale Resource Area of the Medford BLM District in Oregon. In July 2001, BLM issued the EA for the Wilson Project, and in October of that same year BLM issued a Finding of No Significant Impact, which found that the project would not have a significant impact on the human environment and an Environmental Impact Statement was therefore unnecessary. ONRC filed suit seeking a preliminary injunction to halt the logging during the litigation, but the court declined to issue the injunction and granted summary judgment for BLM on June 23, 2004.

On August 23, 2004, ONRC requested relief from the summary judgment, arguing that two subsequent court decisions, Lands Council v. Powell [[353]](#footnote-354)353 and Klamath-Siskiyou Wildlands Center v. Bureau of Land Management (KSWC), [[354]](#footnote-355)354 represented a change in the law. The district court denied the request but said that it "would reconsider the June 23, 2004 order in light of subsequent Ninth Circuit precedent if the court of appeal were to find that procedure to be appropriate." [[355]](#footnote-356)355 Thereafter, ONRC moved for an injunction pending appeal, but the district court again denied the request. This time, the court reasoned that, "although plaintiffs have raised a serious question for litigation on the merits, this relatively small project is nearing completion … ." [[356]](#footnote-357)356

The Ninth Circuit reviewed de novo, [[357]](#footnote-358)357 stating that in the NEPA process an agency must take a "hard look" [[358]](#footnote-359)358 at "the potential environmental consequences of the proposed action." [[359]](#footnote-360)359 The court noted that the standard of review was a narrow one, but the agency's decision would be set aside if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." [[360]](#footnote-361)360

The Ninth Circuit first addressed whether ONRC's action was moot, given that ONRC never received an injunction and logging had continued throughout the litigation. BLM argued that the action was moot because the timber harvesting was complete and no remaining activities could cause a significant environmental impact. The court explained, however, that the issue was "not whether the precise relief sought at the time of the **[\*727]** application for an injunction was filed is still available. The question is whether there can be any effective relief." [[361]](#footnote-362)361 The court also emphasized that "if the completion of the action challenged under NEPA is sufficient to render the case nonjusticiable, [an] entity "could merely ignore the requirements of NEPA, build its structures before the case gets to court, and then hide behind the mootness doctrine. Such a result is not acceptable.'" [[362]](#footnote-363)362

Looking at the facts of the case, the Ninth Circuit concluded that the case was not moot, because, although most, if not all, of the harvesting was complete, "thinning and other husbandry functions" [[363]](#footnote-364)363 remained to be completed. The court cited Neighbors of Cuddy Mountain v. Alexander, [[364]](#footnote-365)364 saying that "although the harvested trees cannot be restored, "because harm to old growth species may yet be remedied by any number of mitigation strategies,' this case is not moot." [[365]](#footnote-366)365 The court also noted that there were many other concerns, such as slash pile management, erosion prevention, and preparation for future sales, and the court explained that an appropriate EA would offer effective relief if the EA properly considered these concerns.

Having found that the case was not moot, the Ninth Circuit next addressed whether the EA was adequate, and the court found that the EA was inadequate for two reasons. First, the court explained that "BLM failed to disclose and consider quantified and detailed information regarding the cumulative impact of the Mr. Wilson logging project combined with past, present, and reasonably foreseeable logging projects." [[366]](#footnote-367)366 BLM argued that such information was only necessary in an EIS as opposed to an EA, and the EA provided sufficient information to determine that the project would not have significant environmental impacts. The Ninth Circuit rejected this argument, however, saying that BLM was in essence arguing that its EA was sufficient ""because we say it is.'" [[367]](#footnote-368)367 The court explained that, just as was the case in KSWC, the EA "did not contain objective quantified assessments of the combined environmental impacts of the proposed actions." [[368]](#footnote-369)368

Secondly, the Ninth Circuit found that the EA was not adequate because it was "tiered to documents which did not contain the requisite site-specific information about the impacts of past, present, and reasonably foreseeable logging." [[369]](#footnote-370)369 Tiering is the practice by which agencies rely on broader environmental impact statements, like one that would accompany a **[\*728]** national program, to address general matters. Agencies are thus able to focus, in particularized EISs, on project specific matters. The court said that with respect to the Mr. Wilson EA, BLM's tiering did not save the EA because the documents to which it was tiered were either inadequate or not NEPA documents.

The Ninth Circuit thus reversed the district court's grant of summary judgment in favor of BLM and remanded the case back to the district court with instruction to enjoin the remainder of the Mr. Wilson project until BLM would provide a revised EA. Judge Tashima authored a lengthy dissent, arguing that the case was indeed moot because all that remained of the Mr. Wilson project was so "trivial" [[370]](#footnote-371)370 that "no effective relief is available under NEPA." [[371]](#footnote-372)371 The dissent also argued that, because plaintiffs in this case brought only a cause of action under NEPA, a purely procedural statute, this case was distinguishable from Neighbors of Cuddy Mountain, in which the court was able to give a remedy because plaintiffs, in addition to their NEPA claim, had also brought a cause of action under a substantive statute.

11. Northwest Environmental Advocates v. National Marine Fisheries Service, 460 F.3d 1125 (9th Cir. 2006).

Northwest Environmental Advocates (NWEA) brought suit under the National Environmental Policy Act (NEPA) [[372]](#footnote-373)372 challenging the adequacy of a 2003 Final Supplemental Integrated Feasibility Report and Environmental Impact Statement (FSEIS) prepared by the United States Army Corps of Engineers (the Corps) in connection with a project to deepen the Columbia River navigation channel and establish new disposal sites to accommodate dredged material. The Ninth Circuit affirmed the district court's grant of summary judgment in favor of the government, holding that the Corps' direct and cumulative effects analyses satisfied NEPA's "hard look" requirement with respect to all environmental and economic factors, including 1) the effects of removing Mouth of Columbia River (MCR) project sediment from the littoral system, 2) the potential for reduction of sediment availability in the estuary, 3) the cumulative impact of the channel deepening project on sediment availability and coastal erosion, 4) the cumulative impact of the channel deepening on salinity and toxicity, 5) the cumulative effect of the channel deepening project on sediment transport, and 6) the economic analyses.

The Columbia River navigation channel, used by transpacific container trade vessels, is currently forty feet deep. To accommodate increasingly heavier loads on ships, Congress, in 1989, initiated a Columbia River Channel Improvement Project directing the Corps to assess the feasibility of deepening the channel to a maximum of forty-three feet from Mile 3 to Mile 106.5. The Corps subsequently issued a Final Integrated Feasibility Report and Environmental Impact Statement (FEIS) in 1999 that described **[\*729]** the project's environmental and economic impacts and alternatives. The 1999 FEIS identified three potential disposal sites to hold dredged material from the channel deepening project and the separate Mouth of the Columbia River (MCR) dredging project: a Shallow Water Site, a Deep Water Site, and the North Jetty Site. The Shallow Water Site and the North Jetty Site are both "dispersive" sites located within the Columbia River's "littoral cell," which includes 100 miles of shoreline from Tillamook Head, Oregon, to Point Greenville, Washington. [[373]](#footnote-374)373 Historically, the Columbia River carries sand from inland areas to the estuary, where the sand is in turn carried to the coastal beaches. Over the past 120 years, natural processes and human activities have reduced the amount of sand deposited throughout the littoral cell, exacerbating erosion on the Oregon and Washington coasts. [[374]](#footnote-375)374 A portion of sediment deposited at these sites would naturally migrate out of the site, but would remain within the Columbia River's sediment transport system. Sediment deposited at the Deep Water Site, by contrast, is considered "inert" because it is dumped beyond the Columbia's littoral cell and thus effectively removed from that cell's sediment transport system.

Discordant federal agency opinions initially undercut the 1999 FEIS. The U.S. Fish and Wildlife Service (FWS) issued a "No Jeopardy" Biological Opinion (BiOp) on the project's potential impact on certain plant and animal species listed under the Endangered Species Act (ESA). The National Oceanic and Atmospheric Assocation's National Marine Fisheries Service (NOAA Fisheries) initially found the project would not jeopardize salmonids, but later retracted its favorable BiOp, citing new information. In 2002, based on new studies by the Corps, NOAA Fisheries and FWS both issued final BiOps concluding that the project would not adversely affect ESA listed species.

The 1999 FSEIS also met resistance from the states of Washington and Oregon. Washington and Oregon denied certification of the project under Section 401 of the Clean Water Act [[375]](#footnote-376)375 and the Coastal Zone Management Act, [[376]](#footnote-377)376 citing concerns about the project hindering sediment transport, the Dungeness crab, and consistency with existing coastal programs. The Corps began preparation of a supplemental environmental impact statement (SEIS) to address those concerns. During consultations that followed, the government hired the non-profit Sustainable Ecosystems Institute (SEI) to review the project's environmental impacts. Throughout 2002, the Corps received and responded to comments on the draft SEIS. In January 2003, the Corps issued an FSEIS to supplement and update the 1999 FSEIS, which it incorporated by reference. After reviewing the revised and expanded analyses in the 2003 FSEIS, Washington and Oregon withdrew their **[\*730]** objections and certified the project. On January 9, 2004, the Corps issued a Record of Decision approving the channel deepening project.

NWEA filed suit in district court alleging that NOAA Fisheries had violated the ESA by failing to study adequately the project's impact on protected salmon. NWEA filed amended complaints arguing that 1) the Corps' 2003 FSEIS and 1998 Dredged Material Management Plan did not sufficiently assess project impacts as mandated by NEPA 2) the Corps was required to prepare a SEIS under NEPA and 3) NOAA Fisheries' revised BiOp failed to comply with applicable law. The Ports of Vancouver, Woodland, Kalama, Longview, Portland, and St. Helens were granted permission to intervene as defendants. On cross-motions for summary judgment, the district court granted the government's motion and denied NWEA's motion. On the alleged NEPA violations, the district court ruled that the Corps had complied with NEPA by taking a "hard look" at and the project's direct and indirect effects. The court found that because the channel deepening project and the MCR project were not "connected actions" under 40 C.F.R. § 1508.25(a)(1), the channel deepening project EIS needed only to consider the MCR in the context of "cumulative impact." On the alleged ESA violations, which NWEA did not challenge on appeal to the Ninth Circuit, the court ruled that NOAA Fisheries could justify its findings and its analysis was not arbitrary and capricious. The court struck and declined to consider NWEA's extra-record submission of a declaration by economist Ernest Niemi, ruling use of such evidence improper. [[377]](#footnote-378)377

The Ninth Circuit reviewed de novo the district court's summary judgment rulings, applying an arbitrary and capricious standard [[378]](#footnote-379)378 to determine whether the Corps' 2003 FSEIS took a "hard look" [[379]](#footnote-380)379 at the potential environmental consequences of the project and otherwise satisfied NEPA's procedural obligations. [[380]](#footnote-381)380 The Ninth Circuit reviewed the district court's decision to exclude extra-record evidence for abuse of discretion. [[381]](#footnote-382)381

i. Cumulative Impact on Coastal Erosion

On appeal to the Ninth Circuit, NWEA's principal contention was that the Corps failed to take a "hard look" at the cumulative impact on coastal erosion. The Ninth Circuit rejected that contention, holding that the Corps did, through responsive amendments and further study, take the required hard look at coastal erosion. The court noted that the Corps adequately addressed the two mechanisms that could potentially remove sand from the **[\*731]** littoral system: direct loss from Deep Water Site disposal of MCR project spoils and indirect loss from altered river hydraulics as a result of channel deepening. The Corps structured its plans to minimize use of the Deep Water Site, and found that channel deepening would not alter the rate of sediment flow in the river or its estuary. [[382]](#footnote-383)382 The court also noted that the Corps considered the channel deepening project in the context of the MCR project, as necessary under a proper cumulative impacts analysis.

The Ninth Circuit first addressed NWEA's NEPA claim that the Corps failed to adequately address the issue of direct sediment loss through Deep Water disposal. The court held the Corps was "fully aware" of the potential erosive effects under the Deep Water disposal option for MCR project spoils, and acted on its knowledge by "conscientiously structuring its disposal plan to minimize" use of that site. [[383]](#footnote-384)383 As the Corps weighed numerous ocean disposal options, the court found, the agency was faithfully concerned about minimizing erosion and keeping sediment within the littoral zone whenever possible. Disposal at the Deep Water Site was the "non-preferred last option," to be used only after capacities were exhausted at the Shallow Water and North Jetty sites. [[384]](#footnote-385)384 The court held that NWEA's criticisms exaggerated the amount of sediment that would be disposed of at the Deep Water Site, for the FSEIS only authorized disposal of all MCR dredge material there for "contingency planning purposes" or as a "worst case scenario." [[385]](#footnote-386)385 The court held that the Management and Monitoring Plan for the Deep Water Site, which the Environmental Protection Agency (EPA) uses to define and limit dumping practices, further ensures that the site will only be used for excess spoils.

The Ninth Circuit held that just as the Corps' 2003 FSEIS took a hard look at the potential erosive effects of MCR project Deep Water spoil disposal, it also took a hard look at erosive effects of channel deepening project Deep Water spoil disposal. The court found persuasive the Corps' alterations reducing dredging volumes between the 1999 FSEIS and the 2003 FSEIS. The revised 2003 FSEIS concluded that the volume of sand to be dredged, relative to the total volume in the riverbed, was too miniscule to have an environmental effect. The court agreed, holding that the Corps took a sufficiently hard look at the cumulative effects of the channel deepening project's sediment removal by considering deep water disposal of both MCR project spoils and channel deepening project spoils

The Ninth Circuit then moved to NWEA's NEPA claim that the Corps failed to adequately assess the issue of estuarine sediment loss through altered river hydraulics and sediment transport rates. The court held the 2003 FSEIS treated this possibility explicitly and thoroughly in response to **[\*732]** Washington and Oregon's concerns, and properly concluded that channel deepening would have no significant impact on sediment transport. The court found persuasive the Corps' readiness to accept input from stakeholders and conduct responsive new studies. The FSEIS found that Federal Columbia River Power System dams, not channel deepening, would be most determinative of river flow rates and thus determinative of sediment availability. The court distinguished this case from Klamath-Siskiyou Wildlands Center v. Bureau of Land Management, where the Bureau of Land Management divided a timber sale into four separate sales and prepared EISs for only two, thereby obscuring the cumulative impact of successive, related actions. [[386]](#footnote-387)386 In this case, the court noted, the 2003 FSEIS examines the project's impacts over an extended period of time and in conjunction with the MCR project and federal dams. The court was further persuaded by the fact that EPA validated the Corps' findings and that Washington and Oregon eventually certified the project. [[387]](#footnote-388)387

ii. Cumulative Impact of Past and Future Actions on Salinity and Sediment Transport

NWEA argued that the Corps failed to evaluate the cumulative impact of the channel deepening project in light of past and future actions, particularly with respect to salinity increases and sediment transport and accretion. The Ninth Circuit rejected both claims. As to salinity increases, the court held that a detailed analysis of past project impacts was unnecessary because it would not have aided the Corps in weighing current alternatives since the channel deepening project would marginally impact salinity. [[388]](#footnote-389)388 Furthermore, the 2003 FSEIS did include historical data on salinity increases associated with the MCR project and, even more persuasively, citations to present-day studies, which indicated that the channel deepening would minimally affect salinity. Likewise, the court held the Corps' assessment of existing MCR jetties and upstream dams was sufficient to inform its sediment transport analysis. The Corps found the channel deepening project's incremental alteration of sediment flow would be negligible as compared with the substantial effect of upstream dams and MCR jetties. The court also held the Corps' treatment of foreseeable future impacts was adequate; the Corps recognized the ongoing impacts of the MCR project and applied lessons learned from the MCR project to develop a disposal plan that minimized coastal erosion.

**[\*733]**

iii. Direct Impacts: Toxicity and Salinity

NWEA contended that the Corps failed to adequately address the direct impacts of the channel deepening project on toxicity and salinity. The Ninth Circuit did not agree, and held that the Corps' assessments were sufficient. NWEA argued that the Corps' failure to sample sediment toxicity outside the navigation channel rendered its analysis deficient, but the court upheld the Corps' findings. Noting the 2003 FSEIS' finding that samples of near-shore sediments would be of little help in determining the channel deepening project's impact on river toxicity since "nearshore sediments are expected to be unaffected," the court characterized further sampling as "unnecessary." [[389]](#footnote-390)389 Holding that the Corps analysis of toxicity was sufficient, the court also found it persuasive that the independent panel from SEI validated the Corps' analysis. NWEA further argued that the Corps underestimated the project's direct impact on estuary salinity because the agency used outdated models and outdated bathymetric data. The court disagreed, upholding the Corps' conclusion, noting that NWEA did not explain what made the old model and old data ineffective. It was sufficient, the court held, that three separate models, from three different institutions [[390]](#footnote-391)390 supported the Corps' finding.

iv. Economic Impacts

NWEA asserted that because the Corps' cumulative impacts analysis was flawed, its economic analysis must have as a consequence "ignored substantial project costs and ways of avoiding those costs." [[391]](#footnote-392)391 Having already reviewed and rejected NWEA's cumulative impact arguments, the Ninth Circuit declined to reconsider those "refashioned substantive criticisms" [[392]](#footnote-393)392 in the context of economics. The court held adequate the Corps' consideration of costs associated with coastal erosion and potential declines in shipping traffic. The court also held that the Corps did not, contrary to NWEA's assertion, need to segregate benefits accruing to foreign entities from those that accrue to domestic entities. It was proper, the court held, for the Corps to aggregate the benefits. Despite NWEA's argument that a "multi-port analysis" would reveal whether any purported gains came at the expense of other domestic ports, the court did not find such an analysis critical to the Corps' cost-benefit calculus particularly because the Corps anticipated that the project would result in regional overall reductions in shipping costs. The agency hired two independent expert panels to review

**[\*734]** the costs and benefits of the project as identified by the agency, and both panels found the Corps' analysis reasonable. [[393]](#footnote-394)393

The Ninth Circuit finally held that the district court did not abuse its discretion by striking the extra-record declaration of economist Ernest Niemi, the stated purpose of which was to "determine whether or not the FSEIS provides a misleading description of the Project's potential economic impacts." [[394]](#footnote-395)394 After setting forth a narrow set of exceptions [[395]](#footnote-396)395 to the general presumption against consideration of extra-record evidence during administrative review, the court concluded that NWEA's proffered evidence did not come within any of those exceptions.

Throughout the opinion, the Ninth Circuit limited the scope of its review to whether the agency took a "hard look." The court scrupulously declined to weigh the wisdom of the Corps' actions or require of the agency more than the minimum analyses mandated by NEPA. The court held the Corps took a hard look at all cumulative, direct, and indirect environmental and economic impacts of the channel deepening project.

v. Judge Fletcher's Dissent

Judge Fletcher filed a lengthy dissent detailing her concerns with the "inconsistency and ambiguity" of the Corps' plans. [[396]](#footnote-397)396 Whereas the majority held the Corps had taken a hard look at all aspects of the channel deepening project, Judge Fletcher disputed that the Corps took a sufficiently hard look at any of the economic or environmental issues. Judge Fletcher faulted the Corps' economic analysis (finding it generally undervalued costs and overvalued benefits), its cumulative effects analysis (finding it did not sufficiently address the consequences of extensive Deep Water Site disposal), and its toxicity and salinity analyses (finding them hasty and lacking ample data). Judge Fletcher also thought the district court abused its discretion by declining to consider Niemi's extra-record declaration, for without it the court could not assess the full range of potential omissions and inaccuracies in the agency's analysis. Generally, Judge Fletcher found the Corps' disposal scheme exceedingly vague, too dependent on too many variables. The specter of severe coastal erosion, a potential consequence of the channel deepening project and associated spoil disposal scheme, pervaded Judge Fletcher's dissent.

**[\*735]**

12. Klamath Siskiyou Wildlands Center v. Boody, 468 F.3d 549 (9th Cir. 2006).

Environmental organizations Klamath Siskiyou Wildlands Center, Umpqua Watersheds, and Cascadia Wildlands Project (collectively KS Wild) brought suit against the Bureau of Land Management (BLM) to invalidate the agency's 2001 and 2003 annual species review decisions (ASR Decisions) regarding the red tree vole (Arborimus longicaudus). KS Wild also sought to enjoin two timber sales, both of which relied on the contested 2001 and 2003 ASR Decisions. KS Wild argued that the ASR Decisions were invalid under both the Federal Land Policy Management Act (FLPMA) [[397]](#footnote-398)397 and the National Environmental Policy Act (NEPA). [[398]](#footnote-399)398 The Ninth Circuit reversed the district court's grant of summary judgment to BLM, holding the 2001 and 2003 ASR Decisions invalid under FLPMA and NEPA. The Ninth Circuit subsequently enjoined the Cow Catcher and Cottonsnake timber sales.

The Northwest Forest Plan (NWFP) amended the resource management plans (RMPs) for many BLM districts, including the Roseburg and Medford districts, by creating a variety of administrative land categorizations and establishing Survey and Manage requirements for hundreds of species. In 2001, the Forest Service and BLM issued a Record of Decision for Amendments to the Northwest Forest Plan (2001 ROD), which expanded the NWFP's four-category Survey and Manage classification system to a six-category system and created the ASR process. Under the ASR system, the agency is required to use adaptive management techniques to inform changes or refinements to the Survey and Manage classifications. After issuing its first ASR on the red tree vole on June 14, 2002, BLM downgraded the red tree vole's Survey and Manage classification from Category C to Category D (2001 ASR Decision). [[399]](#footnote-400)399 The agency removed the red tree vole's Survey and Management designation altogether on December 19, 2003 (2003 ASR Decision). BLM issued environmental assessments (EAs) for the Cow Catcher and Cottonsnake timber sales in June, 2003, and findings of no significant impact (FONSIs) in August, 2003. Consistent with the 2001 ASR Decision downgrading the red tree vole's classification, the agency did not conduct any pre-disturbance vole surveys during the NEPA process.

The Ninth Circuit reviewed the district court's grant of summary judgment de novo. [[400]](#footnote-401)400 Under the Administrative Procedure Act (APA), [[401]](#footnote-402)401 the court may set aside agency decisions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." [[402]](#footnote-403)402 The Ninth Circuit first held that neither judicial estoppel nor laches estopped KS Wild from **[\*736]** bringing its appeal. Timber company intervener D.R. Johnson argued (BLM did not join this argument) that KS Wild should be estopped on grounds of judicial estoppel and laches from bringing its appeal. Johnson asserted that previous arguments by KS Wild and Umpqua Watersheds in Northwest Ecosystem Alliance v. Rey [[403]](#footnote-404)403 supporting the 2001 ROD and the ASR process were inconsistent with its current position challenging BLM's ASR Decisions. The Ninth Circuit rejected this argument, reasoning that KS Wild and Umpqua only supported the 2001 ROD and ASR process "insofar as they sought to invalidate the 2004 ROD." [[404]](#footnote-405)404 The court distinguished KS Wild's past arguments, which asserted that the 2001 ROD was an effective forest management strategy, from the position that "all agency actions ostensibly taken pursuant to the ASR are lawful." [[405]](#footnote-406)405 The court held that the organizations did not take a "clearly inconsistent position" so judicial estoppel did not apply. The court also rejected Johnson's laches claim, holding the company failed to establish both (1) "lack of diligence by the party against whom the defense is asserted and (2) prejudice to the party asserting the defense." [[406]](#footnote-407)406 The court held that KS Wild did not show lack of diligence by "abandoning" an earlier claim challenging the 2001 ROD, when that case was dismissed without prejudice before KS Wild filed the current claim fifteen days later. [[407]](#footnote-408)407 Nor did Johnson's economic losses amount to prejudice, for not only was that type of harm not pertinent to the laches analysis, [[408]](#footnote-409)408 but laches is generally disfavored in environmental cases because the public at large would be harmed by environmental damage. [[409]](#footnote-410)409

The Ninth Circuit next turned to KS Wild's FLPMA claims. Under FLPMA and the governing regulations, BLM must formally amend RMPs when a proposed action will change either "the scope of resource uses" or the "terms, conditions, and decisions" of the plan. [[410]](#footnote-411)410 However, the agency may make certain minor "maintenance" type changes to the plan without triggering formal amendment. [[411]](#footnote-412)411 In this appeal, BLM argued its 2001 and 2003 ASR Decisions merely "maintained" the 2001 ROD, so formal procedures were unnecessary. The Ninth Circuit disagreed, holding the ASR Decisions amended the RMP and that as a consequence the agency's failure to adhere to formal procedures violated FLPMA. The ASR Decisions relied on mostly (eighty percent) new data - too high a volume, the court reasoned, to slip **[\*737]** within the narrow scope of the "maintenance" provision. While the 2001 ROD may have anticipated some changes to the Survey and Manage classifications, the ASR Decisions fundamentally altered the terms and conditions of the RMPs. The court cautioned that too broad a "maintenance" allowance would nullify FLMPA's requirement that the agency act in accordance with established RMPs. [[412]](#footnote-413)412 However, the court explicitly rejected KS Wild's argument that the ASR Decisions qualified as "amendments" because they worked a "change in resource uses" [[413]](#footnote-414)413 by potentially increasing timber harvests. The ASR Decisions may have changed the probable sale quantity (PSQ), but the "scope of the resource uses" remained within the RMP's rough estimates. [[414]](#footnote-415)414

The Ninth Circuit rejected BLM's argument that the ASR process satisfied FLPMA's requirements for formal amendments because the process was supported by the Final Supplemental Environmental Impact Statement (2000 FSEIS) prepared for the 2001 ROD. Even if the 2000 FSEIS did contemplate some modifications under the adaptive management scheme, the court indicated that at some point modifications are so dramatic that they cannot be justified as "maintenance." Moreover, the court noted that the 2000 FSEIS weighed and "resoundingly rejected" an alternative that would have put the voles in a less protective category to begin with. The 2000 FSEIS concluded that placing the vole in that lesser category would "increase the risk" of isolation and inadequate connectivity by fragmenting habitat. [[415]](#footnote-416)415 The court also noted that a statement in the 2000 FSEIS indicating that five years would be an insufficient amount of time to "make an informed recommendation to the species['] future disposition" belied BLM's claim that the document supported the ASR Decisions that lowered the vole's Survey and Management status. The court held that BLM's ASR Decisions violated FLPMA because they heralded a "dramatic change in policy" regarding the red tree vole's Survey and Manage designation, and amounted to a change in a "term or condition" in the RMP that required the agency to undertake a formal amendment process.

The Ninth Circuit then addressed KS Wild's claims that BLM should have subjected its 2001 and 2003 ASR Decisions to NEPA analysis. Agencies must prepare a supplemental EIS where 1) the agency makes substantial changes in the proposed action that are relevant to environmental concerns, or 2) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. [[416]](#footnote-417)416 The court held BLM's ASR Decisions met both prongs of this threshold, obliging a supplemental EIS.

The court held that the ASR Decisions made "substantial changes" in the RMPs. While the court agreed with BLM that changes in agency policy do **[\*738]** not always require NEPA analysis, [[417]](#footnote-418)417 it faulted the agency's failure to prepare a supplemental EIS for the same reasons it cited in holding the agency violated FLPMA. That is, the court again characterized BLM's ASR Decisions as RMP amendments rather than mere "maintenance" changes and noted the 2000 FSEISs' explicit rejection of assigning the vole a less protective status. The court rejected BLM's argument that the Supreme Court's decision in Southern Utah Wilderness Alliance v. Norton [[418]](#footnote-419)418 (SUWA) compelled the court to treat the 2001 ROD and the Medford and Roseburg RMPs, rather than the ASR Decisions, as the final "agency action." The ASR Decisions would be insulated from NEPA review under that analysis, since NEPA only applies to "major Federal actions." [[419]](#footnote-420)419 The court held, as did the Supreme Court in SUWA, [[420]](#footnote-421)420 that amendments to RMPs require supplemental NEPA analysis. Having already determined that the ASR Decisions are amendments requiring formal procedures, the court held that the ASR Decisions necessarily also trigger the NEPA requirement of a supplemental EIS. [[421]](#footnote-422)421

The court also held that the ASR Decisions were the product of "significant new circumstances or information." Again, because the changes to the vole's Survey and Manage designation "dramatically" altered BLM's obligations and were based on data not available when the 2000 FSEIS was created, the court held the ASR Decisions were "significant." Following its reasoning in Idaho Sporting Congress v. Thomas, [[422]](#footnote-423)422 the court explained that an agency must prepare an EIS where a plaintiff raises substantial questions as to whether a project may have a significant effect. [[423]](#footnote-424)423 The plaintiff need not show that significant effects will in fact occur. The court held that the 2001 ASR Decision raised substantial questions as to its impact because it adopted a policy that closely resembled the alternative rejected only months before in the 2000 FSEIS. The court also found relevant BLM's failure to produce even an EA, a document "fundamental to the decision-making process." [[424]](#footnote-425)424 The Ninth Circuit held BLM's 2001 and 2003 ASR Decisions regarding the red tree vole invalid for failing to satisfy NEPA.

The Ninth Circuit quickly disposed of the timber sale claims, holding that because the ASR Decisions violated FLPMA and NEPA, the sales were invalid for failure to "conform to the approved RMP" as required by FLPMA regulations. [[425]](#footnote-426)425 The court enjoined both the Cow Catcher and the Cottonsnake sales. The court reinstated the Survey and Manage designations under the 2001 ROD, [[426]](#footnote-427)426 and since neither sale conducted pre-disturbance **[\*739]** surveys for red tree voles as required for Category C species, they did not comply with the 2001 ROD.

In sum, the Ninth Circuit held the 2001 and 2003 ASR Decisions invalid for failure to comply with FLPMA and NEPA. The court held unlawful and enjoined the Cowcatcher and Cottonsnake timber sales, which complied with the (consequently invalid) ASR Decisions rather than the (reinstated) 2001 ROD.

13. Nuclear Information & Resource Service v. Nuclear Regulatory Commission, 457 F.3d 941 (9th Cir. 2006).

The Nuclear Information and Resource Service, Committee to Bridge the Gap, Public Citizen, Inc., and Redwood Alliance (collectively NIRS) brought suit against the Nuclear Regulatory Commission (NRC) claiming that, when NRC issued regulations governing exemption standards for the transportation of radioactive material, it failed to comply with the rulemaking requirements of the National Environmental Policy Act (NEPA). [[427]](#footnote-428)427 NIRS alleged that NRC violated NEPA by making a finding of no significant impact (FONSI) without basis and consequently not preparing an Environmental Impact Statement (EIS). The Ninth Circuit dismissed the case without addressing the merits because NIRS failed to satisfy the injury-in-fact and redressability elements of Article III standing.

In July 2000, NRC and the Department of Transportation (DOT) began a rulemaking process for amending domestic regulations for the transportation of radioactive material such that they would be consistent with the international regulations adopted by the International Atomic Energy Agency (IAEA). NRC is authorized to regulate the use and possession of radioactive material. [[428]](#footnote-429)428 DOT is authorized to designate hazardous material and prescribe regulations for the transportation of such material. [[429]](#footnote-430)429 The regulations that were the subject of this case dealt with "exemption values" - standards whereby material is deemed "exempt" from nuclear transportation regulations if it is below the value or regulated if it is above the value. NIRS challenged the NRC's revision from an "activity-concentration" to a "dose-based" standard for determining exemption values. [[430]](#footnote-431)430

After publishing an Issues Paper, soliciting written comments, holding three public meetings, subsequently publishing a notice of a proposed rulemaking and a draft environmental assessment (EA), and allowing for further public comment, NRC issued a final EA. Then, on January 26, 2004, **[\*740]** NRC published a Final Rule adopting the new dose-based IAEA exemption values and making a finding of no significant impact in stating that the new rules would "result in no adverse impact on public health and safety." [[431]](#footnote-432)431 That same day, DOT issued a final ruling that harmonized its regulations with the IAEA standards. [[432]](#footnote-433)432

On March 26, 2004, NIRS filed for review of the NRC rulemaking in the Ninth Circuit as permitted by the Hobbs Act. [[433]](#footnote-434)433 On November 9, 2004, NIRS filed an action in district court seeking review of the DOT rulemaking. The next day it also filed a motion to transfer the NRC proceedings from the Ninth Circuit to district court, but the Ninth Circuit denied the request without prejudice. On January 10, 2005, DOT filed, in district court, a motion to dismiss for lack of subject matter jurisdiction pursuant to 49 U.S.C. § 20114(c). The district court granted the motion and the Ninth Circuit granted NIRS's appeal, consolidating the DOT case with the NRC case for oral argument and issuing two separate opinions. [[434]](#footnote-435)434 This opinion dealt only with NRC's petition.

The Ninth Circuit began by identifying two inquiries necessary to address NIRS's claim that it had standing to challenge NRC's regulations under NEPA: 1) whether NIRS met the "case-and-controversy" requirement of Article III of the United States Constitution, [[435]](#footnote-436)435 and 2) whether the plaintiff met the non-constitutional or prudential standing requirements; in other words, whether the statute under which the plaintiff brought the suit granted the plaintiff a right to sue. [[436]](#footnote-437)436

In regards to the first inquiry, the court laid out the requirements of Article III standing:

[A] plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent … ; (2) the injury is fairly traceable to the challenged action of the defendants; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. [[437]](#footnote-438)437

The court stated that the fact that the injury that NIRS asserted was procedural did not fundamentally change the standing analysis. [[438]](#footnote-439)438 To establish a procedural injury "[a plaintiff] must allege … that (1) the [agency] violated certain procedural rules; (2) these rules protect [a **[\*741]** plaintiff's] concrete interests; and (3) it is reasonably probable that the challenged action will threaten their concrete interests." [[439]](#footnote-440)439 A proper injury exists when a plaintiff asserts that a proper EIS has not been prepared and the proposed action threatens a concrete interest, e.g., aesthetic or recreational interests. [[440]](#footnote-441)440 The concrete interest test requires a "geographic nexus" between the area affected and the individual asserting the claim. [[441]](#footnote-442)441 Once injury in fact is established under NEPA, the requirements for causation and redressability are relaxed. [[442]](#footnote-443)442 Plaintiffs "need only establish "the "reasonable probability" of the challenged action's threat to [their] concrete interest.'" [[443]](#footnote-444)443 An association such as NIRS has standing to sue on behalf of its members when "its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." [[444]](#footnote-445)444

In regards to the second inquiry - whether NIRS had a right to sue under a statute - the court pointed out that NEPA did not provide a private right of action. NIRS was therefore forced to rely instead on the Administrative Procedures Act (APA). [[445]](#footnote-446)445 In order to meet the requirements of APA standing, a plaintiff "must establish (1) that there has been final agency action adversely affecting [it], and (2) that, as a result, it suffers legal wrong or that its injury falls within the "zone of interests' of the statutory provision the plaintiff claims was violated." [[446]](#footnote-447)446

The Ninth Circuit then applied the injury-in-fact test and determined that NIRS failed to meet the requirement. The declarations from NIRS's members did not "explain in any way how their health may be affected by this regulation." [[447]](#footnote-448)447 They did not allege specific geographic areas most likely to be affected, except for mention of "highways nationwide." [[448]](#footnote-449)448 Nor did they allege that they would be exposed to increased amounts of radiation or use the highways less because of the regulation. [[449]](#footnote-450)449 The court held that "NIRS **[\*742]** fails to explain why the new, on average more protective, regulation presents a credible threat to its members' health." [[450]](#footnote-451)450 A "general concern" of exposure to radioactive materials that may result in adverse health consequences was not enough.

Furthermore, the Ninth Circuit held that NIRS failed to demonstrate that its members' concrete interest was "threatened by the challenged regulation" rather than by the abstract risks of exposure to "unregulated transportation of radioactive material." [[451]](#footnote-452)451 The court contrasted this case with Salmon River Concerned Citizens v. Robertson, [[452]](#footnote-453)452 in which the plaintiffs submitted affidavits that stated in great detail how pesticide use would adversely affect their health and ability to use the national forest. [[453]](#footnote-454)453 Instead, this case was similar to Lujan v. Defenders of Wildlife [[454]](#footnote-455)454 in which the plaintiffs raised "only a generally available grievance about the government" and sought "relief that no more directly and tangibly benefited [them] than it did the public at large." [[455]](#footnote-456)455 The court concluded that NIRS failed to meet the minimum of demonstrating that the exemption standards threatened a concrete interest of its members.

The court noted that, even if NIRS's interest was sufficiently concrete, the evidence suggested that this interest was helped rather than harmed by the new regulations - the average exposure to radiation would be lower under the new regulations. The court distinguished cases in which the court found a "reasonable probability" of harm due to the adoption of a less environmentally protective rule, because the new regulations appeared to be generally more protective. [[456]](#footnote-457)456

The court rejected NIRS's argument that, because NEPA does not require environmental impacts to be negative in order to be "significant," [[457]](#footnote-458)457 it did not need to demonstrate a "reasonable probability of a threat to a concrete interest." [[458]](#footnote-459)458 NIRS pointed to no authority and the court did not know of any authority that stated a government action would harm a concrete interest when the action was beneficial to the plaintiffs.

The Ninth Circuit also rejected NIRS's contention that the new regulations would expose some of the public to more radioactivity. The court pointed out that this contention could have been more successful if NIRS had alleged and submitted affidavits which demonstrated that its own members would be exposed to greater radioactivity as a result of the regulation. "The fact that unindentified members of the public may be **[\*743]** exposed to a higher risk … does not [by itself] establish an injury to NIRS members." [[459]](#footnote-460)459

The court then held that NIRS also failed to establish the standing requirement of redressability because the Ninth Circuit could not, in this case, require DOT to revisit its parallel exemption standards even if it required NIRS to. NIRS argued that it was only required to show that NRC's performance of an EIS could result in a different exemption rule and, furthermore, because NRC's environmental analysis was the foundation for both the NRC and DOT rules, setting aside NRC's NEPA investigation would remedy NRC's challenge to the DOT rule as well. The court agreed that in a normal NEPA case the plaintiff need only show that "the [agency's] decision could be influenced by the environmental considerations that [the relevant statute] requires an agency to study." [[460]](#footnote-461)460 However, this was not a normal NEPA case because, even if the court remanded the rule to the NRC, there was nothing that required DOT to revisit its identical exemption standards. [[461]](#footnote-462)461 The court thus concluded that since the DOT rule was not before the court, it could not redress NIRS's asserted injury.

In conclusion, the Ninth Circuit held that NIRS failed to establish the Article III standing requirements of injury in fact and redressability. Therefore, the court dismissed the petition for lack of standing.

14. Lands Council v. Martin, 479 F.3d 636 (9th Cir. 2007).

The Lands Council, Oregon Natural Resources Council, Hells Canyon Preservation Council, and the Sierra Club (Lands Council) appealed the district court's denial of their request for a preliminary injunction to stop United States Forest Service (USFS) post-fire logging sales in the Umatilla National Forest. The Ninth Circuit determined that the district court did not abuse its discretion when it denied Lands Council's motion for a preliminary injunction under the National Environmental Policy Act (NEPA), [[462]](#footnote-463)462 but that the court did abuse its discretion when it denied Lands Council's motion for a preliminary injunction under the National Forest Management Act (NFMA). [[463]](#footnote-464)463 Accordingly, the Ninth Circuit remanded the case with instructions to issue a preliminary injunction immediately.

The School Fire burned 51,000 acres in southeastern Washington in August 2005, including 28,000 acres in the Umatilla National Forest. After the fire was extinguished, USFS developed a plan to harvest "dead and dying" trees in the burned areas of the National Forest. The agency released a Final Environmental Impact Statement (FEIS), presenting three alternatives, and **[\*744]** USFS chose the alternative that allowed for the harvest of 9423 acres, including portions of two uninventoried roadless areas. [[464]](#footnote-465)464 Both of the uninventoried areas were 5000 acres or less. The Forest Service Chief issued an Emergency Situation Determination (ESD), premised on the prediction that "delay would result in a potential loss of value of $ 1,547,000 to the Federal Government," which authorized immediate logging on three sales. Lands Council filed suit the day after the ESD was issued, and the district court denied Lands Council's motions for a temporary restraining order and a preliminary injunction. Lands Council immediately appealed to the Ninth Circuit.

The Ninth Circuit began by stating the proper test for granting a motion for a preliminary injunction. A preliminary injunction should be granted when a plaintiff demonstrates "either: (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in [the plaintiff's] favor." [[465]](#footnote-466)465 Thus, if the plaintiff is likely to prevail on the merits, or the plaintiff can show that it is in the public interest and the hardship suffered by the plaintiffs is great, the court should grant a preliminary injunction. The Ninth Circuit reviews district court determinations regarding preliminary injunctions under an abuse of discretion standard. [[466]](#footnote-467)466

The Ninth Circuit considered Lands Council's NEPA claims first. Lands Council argued that NEPA requires USFS to consider the impact of significant logging activities on roadless areas within the sale areas, and the agency failed to do so for the salvage sales following the School Fire. The court pointed out that while the FEIS did not specifically consider the effect on the roadless character of the two roadless areas affected, the FEIS thoroughly considered the impact of logging and acknowledged that logging would occur in roadless areas. Under the Wilderness Act of 1964, [[467]](#footnote-468)467 the size of the inventoried roadless area is a consideration for the designation of wilderness areas. Thus, NEPA may require consideration of the impact of logging on inventoried roadless areas and uninventoried roadless areas over 5,000 acres. [[468]](#footnote-469)468 However, the Wilderness Act does not require that all roadless areas over 5000 acres be deemed wilderness areas. The Wilderness Act does require the district court to carefully consider the roadless area at issue and determine whether the EIS adequately addresses the impact of logging on the roadless area. Under this framework, the Ninth Circuit held the district court did not abuse its discretion by denying Lands Council's motion for a preliminary injunction under NEPA.

**[\*745]** Next, the Ninth Circuit turned to Land Council's claim under the NFMA. The core issue was whether the Forest Plan's definition of "live trees" included all trees that are not dead. The Forest Plan for the Umatilla National Forest included provisions called the "Eastside Screens," [[469]](#footnote-470)469 which stated that the agency could not harvest any "currently existing" old-growth trees over twenty-one inches in diameter at breast height. [[470]](#footnote-471)470 The court noted that USFS violates NFMA when it does not comply with a provision in an applicable Forest Plan. The court rejected USFS' argument that the Forest Plan did not proscribe logging injured and dying trees, noting that the FEIS employed the Scott Mortality Guidelines for marking trees for harvest. Under these guidelines, trees are marked if they are dead or will die relatively soon. Thus, under these guidelines, some live trees will be marked for harvest.

To determine whether the Forest Plan prevented harvest of dying trees, the Ninth Circuit determined that the phrase "live trees" in the Forest Plan was intended to carry the common understanding of the word "live" and therefore included all trees that were not dead. The court reasoned that the context of the provision in the Forest Plan supported its construction that the phrase "live trees" included dying trees, for use of the phrase "currently exists" suggests that even trees expected to die within a year, but are not dead, are live because they "currently exist." The court rejected USFS' argument that the phrase "live trees" was a technical term that warranted judicial deference to agency expertise, noting that the record did not show that the Forest Service ever intended adopt any technical meaning.

The Ninth Circuit concluded that the district court erred, for Lands Council showed that 1) it would likely prevail on the merits of its NFMA claim, and 2) it would suffer permanent injury if a preliminary injunction was not issued. The court reversed the district court's denial of Land Council's motion for a preliminary injunction, and remanded the case with instructions to issue a preliminary injunction immediately to prevent harvest of live trees over twenty-one inches in diameter at breast height.

C. Clean Air Act

1. Safe Air for Everyone v. Environmental Protection Agency, 475 F.3d 1096 (9th Cir. 2007).

Safe Air for Everyone (SAFE) petitioned the Ninth Circuit for review of the United States Environmental Protection Agency's (EPA) decision to approve an amendment to Idaho's State Implementation Plan (SIP) under **[\*746]** the Clean Air Act (CAA) [[471]](#footnote-472)471 that would permit farmers to burn crop residue in their fields despite language in the preexisting SIP that arguably banned such burning. SAFE argued that EPA's approval violated certain provisions of the CAA that prohibited amending SIPs such that they violate air quality standards. EPA maintained that the amendment was consistent with the CAA. After reviewing the thirty-five year history of Idaho's SIP, the Ninth Circuit granted the petition and held that, because EPA's approval relied on the false premise that the amendment was consistent with the preexisting SIP, the agency's approval of the amendment was "arbitrary, capricious, or otherwise not in accordance with law." [[472]](#footnote-473)472 Accordingly, the Ninth Circuit remanded to EPA to reconsider the amendment as a change to the preexisting SIP rather than a mere "clarification." [[473]](#footnote-474)473

In 1970, Congress passed the CAA authorizing EPA to create air quality standards setting the maximum allowable concentration of certain pollutants, including particulate matter produced from burning. [[474]](#footnote-475)474 To implement these standards, the CAA relies on significant state participation. [[475]](#footnote-476)475 The act requires that all states submit a SIP to EPA, in which the state proposes methods of maintaining air quality. [[476]](#footnote-477)476 If EPA approves the SIP, these plans have "the force and effect of federal law." [[477]](#footnote-478)477 The CAA mandates that these plans provide for regular revisions to accommodate for changes in air quality conditions and standards. [[478]](#footnote-479)478 The state can revise particular provisions by submitting amendments to EPA, [[479]](#footnote-480)479 which then determines whether the revised SIP meets CAA requirements. [[480]](#footnote-481)480 EPA "shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress … or another applicable requirement of [the CAA]." [[481]](#footnote-482)481

EPA approved Idaho's original SIP in May 1972, as well as a number of revisions over the next thirty-five years. Amendments in 1993 substantially changed the open burning provisions by removing field burning from the list of exceptions and imposing a general ban on open burning. [[482]](#footnote-483)482 The substantive language of these provisions remained identical until 2005 when the EPA approved amendments to the SIP that added field burning to the **[\*747]** categories of allowed burning. Although Idaho had enacted state statutes dealing with field burning previously, this was the first explicit reference to them in the SIP. [[483]](#footnote-484)483 The relevant provision states:

The open burning of crops residue on fields where the crops were grown is an allowable form of open burning if conducted in accordance with the Smoke Management and Crop Residue Disposal Act and the rules promulgated pursuant thereto. [[484]](#footnote-485)484

During the 2005 rulemaking to approve this provision, SAFE submitted comments to the EPA and, after EPA approved the open burning provision, SAFE petitioned the Ninth Circuit for review. The Ninth Circuit asserted jurisdiction over this case under 42 U.S.C. § 7607(b)(1), [[485]](#footnote-486)485 reviewing EPA's decision under the "arbitrary, capricious, or not in accordance with law" standard of the Administrative Procedure Act (APA). [[486]](#footnote-487)486

The Ninth Circuit began by examining the last version of Idaho's SIP prior to the 2005 amendments - the 2003 SIP. It stated that "no person shall allow, suffer, cause or permit any open burning operation unless it is a category of open burning set forth" in ten sections. [[487]](#footnote-488)487 The court determined that these sections did not include field burning and that the EPA had acknowledged that during the 2005 rulemaking proceedings. [[488]](#footnote-489)488 The Ninth Circuit stated that "in interpreting a SIP, we begin with a look toward the plain language of the plan and stop there if the language is clear." [[489]](#footnote-490)489 Given the broad prohibition and the absence of an applicable exception, the Ninth Circuit concluded that the plain language of the 2003 SIP prohibited field burning. [[490]](#footnote-491)490

Despite the fact that based on the plain language, the court "would quite readily conclude that the pre-2005 Idaho SIP did not permit field burning," [[491]](#footnote-492)491

**[\*748]** the court first addressed EPA's conclusion that this "clear-as-day prohibition" [[492]](#footnote-493)492 did not resolve the meaning of the SIP.

To determine the SIP's meaning, the EPA considered Idaho's "intent" in drafting it, "the State's overall approach to field burning," and relevant Idaho legislative history. [[493]](#footnote-494)493 EPA further evaluated its own past actions to conclude that it "understood agricultural burning to be allowed in Idaho and that the SIP [did] not prohibit it." [[494]](#footnote-495)494 However, the Ninth Circuit determined that EPA's analysis was flawed. First, the agency's interpretation was not due any deference because these past actions did not purport to interpret relevant SIP provisions and EPA had not taken any previous position on the proper way to interpret a SIP. Second, Idaho's interpretation of the regulations incorporated into the SIP was "not directly dispositive of the meaning of the SIP." [[495]](#footnote-496)495 A CAA SIP approved by the EPA, like regulations promulgated by authorized states under the Clean Water Act, [[496]](#footnote-497)496 carries "the force and effect of federal law" [[497]](#footnote-498)497 such that it cannot "be changed unless and until the EPA approved any change." [[498]](#footnote-499)498 Therefore, the court concluded that the meaning of the SIP should be interpreted under the standards for federal law, which start with the "plain meaning of a regulation." [[499]](#footnote-500)499 If the regulation has plain meaning then the court does not interpret other interpretative materials including the agency's interpretation. [[500]](#footnote-501)500

Because plain language does not control if "clearly expressed legislative intent" is to the contrary, … or [if] such plain meaning would lead to absurd results," [[501]](#footnote-502)501 the Ninth Circuit determined that, for the first time, it must consider "how definitely and in what form such intent must be expressed" [[502]](#footnote-503)502 to do so. The court concluded that the notice requirements of the APA [[503]](#footnote-504)503 require "that some indication of the regulatory intent that overcomes plain language must be referenced in the published notices that accompanied the rulemaking process." [[504]](#footnote-505)504 Without such published notice, interested parties would not have an opportunity to comment [[505]](#footnote-506)505 because **[\*749]** "they would have no way of knowing what was actually proposed." [[506]](#footnote-507)506 The court noted this disclosure was particularly important under the CAA because judicial challenges must be filed within sixty days of a SIP's approval. [[507]](#footnote-508)507 Otherwise, interested parties could be misled into not challenging a regulation by relying on its plain meaning, then after sixty days be foreclosed from challenging the agency's newly disclosed alternate interpretation.

Applying this analysis in Idaho's situation, the Ninth Circuit held that the plain language prohibiting field burning in Idaho's 2003 SIP produced neither "absurd results" [[508]](#footnote-509)508 nor contradicted the plan's administrative history. Citing the administrative record of air quality and health problems associated with field burning in Idaho, [[509]](#footnote-510)509 the court determined "it [was] far from patently inconceivable" that the SIP would "ban a significant source of the state's particulate pollution." [[510]](#footnote-511)510 Furthermore, there was no clear contrary administrative intent expressed in the published notices accompanying the SIP's consideration and adoption. Restricting its review of agency decisions to the reasoning the agency relied upon in making its decision, [[511]](#footnote-512)511 the court refused to consider informal EPA materials and formal actions by Idaho legislators because they were not referenced in any of the published materials accompanying the SIP.

Next, the Ninth Circuit rejected two post hoc reasons [[512]](#footnote-513)512 EPA offered on appeal for why the court should not rely on the plain meaning of the 2003 and earlier SIPs. First, EPA argued that "giving effect to the plain meaning of a SIP contrary to the true intent of state policymakers would violate case law prohibiting EPA from enacting more stringent SIP provisions than those proposed by the state." [[513]](#footnote-514)513 However, the court distinguished the cases cited for this proposition [[514]](#footnote-515)514 because they interpreted the CAA concerning EPA's authority to approve or deny SIPs, whereas this case dealt with "interpreting SIP language that was originally proposed by the state." [[515]](#footnote-516)515 The court stated that it did not detract from the **[\*750]** state's role in developing a strategy for achieving air quality standards to require that the state express its intent "understandably when submitting proposed SIPs." [[516]](#footnote-517)516

Second, EPA argued that relying only on the SIP's plain language would contradict Riverside Cement in which the Ninth Circuit ruled the EPA was prohibited from approving SIPs whose operation was "contingent upon the results of ongoing fact finding" [[517]](#footnote-518)517 and, therefore, based on "elusive and illusory measure." [[518]](#footnote-519)518 However, the Ninth Circuit held that the 2003 SIP was not illusory because there was nothing contingent or indefinite about its plain language, and that Riverside Cement's reliance on explicit language further supported the court's analysis.

In sum, the court held that "SIPs are interpreted based on their plain meaning when such a meaning is apparent, not absurd, and not contradicted by the manifest intent of EPA, as expressed in the promulgating documents available to the public." [[519]](#footnote-520)519 Based on this analysis, federal law banned field burning in Idaho prior to the 2005 amendment to Idaho's SIP.

The Ninth Circuit did not reach SAFE's claims that the 2005 amendment violated sections 110(l) and 193 of the CAA, [[520]](#footnote-521)520 other than "to hold that EPA's reasoning in rejecting [the claims] cannot be squared with our interpretation of Idaho's pre-2005 SIPs." [[521]](#footnote-522)521 EPA's approval of the 2005 amendment relied on the fundamental premise that "EPA does not believe that Idaho's existing SIP when viewed in its entirety prohibits the burning of crop residue." [[522]](#footnote-523)522 Furthermore, the EPA relied on that premise when it rejected SAFE's claims at the time it approved the 2005 amendment [[523]](#footnote-524)523 and in its brief to the Ninth Circuit. [[524]](#footnote-525)524 The court held that this premise was incorrect and should be removed from the record. After this premise was removed the record no longer included a determination of whether the change to the SIP from prohibiting to allowing field burning contravened statutory requirements. Because the court's review of EPA's action is restricted to the reasoning disclosed in the administrative record, [[525]](#footnote-526)525 it must "remand to the agency for additional investigation or explanation" [[526]](#footnote-527)526 before fully considering EPA's action.

**[\*751]** In conclusion, the Ninth Circuit rejected EPA's premise that the preexisting SIP did not ban field burning. Because that premise was fundamental to EPA's determination that the amendment did not contravene CAA requirements, the court held that EPA's outcome was "arbitrary, capricious, or otherwise not in accordance with law." [[527]](#footnote-528)527 The court granted SAFE's petition, but it did not interpret the meaning of the CAA provision relied upon by SAFE. Instead, the Ninth Circuit remanded to EPA giving it "the first opportunity" [[528]](#footnote-529)528 to evaluate the 2005 amendment as a change from a SIP that bans field burning to a SIP that allows and regulates it.

D. Clean Water Act

1. Southeast Alaska Conservation Council v. United States Army Corps of Engineers, 472 F.3d 1097 (9th Cir. 2006).

Intervenor, mining company, Coeur Alaska, Inc. (Coeur Alaska) appealed the Ninth Circuit's grant of a preliminary injunction pending appeal to Southeast Alaska Conservation Council (SEACC) to enjoin construction of a disposal facility that would involve construction of a permanent dam. The Ninth Circuit denied Coeur Alaska's motion to vacate the injunction, determining that the injunction was appropriate because 1) SEACC demonstrated a likelihood of success on the merits, 2) SEACC showed that it would suffer irreparable harm if the injunction was not granted, 3) the balance of hardship favored SEACC, and 4) it is in the public interest to prevent irreparable environmental harm. Accordingly, the court denied Coeur Alaska's motion and directed the parties to the suit to convene and determine how to deal with the threat caused by excessive precipitation to the structural integrity of the coffer dam. [[529]](#footnote-530)529

SEACC originally filed suit claiming that the United States Army Corps of Engineers (Corps), and the United States Forest Service (USFS) violated the Clean Water Act (CWA) [[530]](#footnote-531)530 in issuing a permit to Coeur Alaska. An Alaska district court granted Coeur Alaska's motion for summary judgment; SEACC appealed and the Ninth Circuit issued an injunction pending appeal that prevented the Corps, USFS, and Coeur Alaska from activities "relating to the construction of a disposal facility at Lower Slate Lake." [[531]](#footnote-532)531 In the present proceeding, Coeur Alaska challenged the Ninth Circuit's grant of a preliminary injunction to SEACC, arguing that a preliminary injunction was **[\*752]** no longer necessary due to weather conditions at the dam construction site and in light of the Supreme Court's decision in Purcell v. Gonzalez. [[532]](#footnote-533)532

The Ninth Circuit rejected Coeur Alaska's reliance on Purcell v. Gonzalez, determining that the rationale from Purcell is untimely as applied to the present proceeding. In Purcell, the Supreme Court vacated a Ninth Circuit court order that was inconsistent with subsequent district court factual findings. With respect to the present proceeding, the court noted that if Coeur Alaska believed that the Ninth Circuit's grant of an injunction was in error, its remedy was to petition the Supreme Court for certiorari relief, which Coeur Alaska had not done. Additionally, the court said that to the extent that its grant of an injunction was not based on factual findings, there was nothing in Purcell to suggest that the court could not remedy that shortcoming by making findings in the future.

The Ninth Circuit next dealt with whether an injunction was appropriate in the present case. The court stated that when determining if an injunction is appropriate, the court ""balances the plaintiff's likelihood of success against the relative hardship to the parties.'" [[533]](#footnote-534)533 The court identified two tests used to assist in making this determination: the "traditional test" and the "alternative test." Under the traditional test, the "moving party must show: (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to the plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest." [[534]](#footnote-535)534 Under the alternative test, the moving party must show "either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor." [[535]](#footnote-536)535 The court made sure to point out that these two tests represent opposite ends of the continuum under which the appropriateness of injunctive relief should be measured.

The court applied these tests to the current case, and determined first, that SEACC had demonstrated a likelihood of success on the merits with its argument that the permit violated the CWA. Second, SEACC would suffer irreparable harm if injunctive relief was withheld because environmental destruction caused by completion of the dam was an ongoing environmental harm. Third, the balance of hardship favored SEACC because of the irreparable harm that SEACC would suffer if injunctive relief was withheld. Conversely, Coeur Alaska would not suffer great harm as a result of the injunction because construction did not need to begin right away. Lastly, the court determined that granting injunctive relief was in the public interest because "the public interest strongly favors preventing environmental **[\*753]** harm," [[536]](#footnote-537)536 and it was unlikely that the public would suffer much economic harm from the construction delay.

The court next noted that in order to vacate the injunction, Coeur Alaska had to demonstrate that "facts have changed sufficiently since the court issued its order." [[537]](#footnote-538)537 The court rejected Coeur Alaska's assertion that heightened precipitation levels made the existing coffer dam unstable and threatened to increased sedimentation downstream, determining that Coeur Alaska had not met its burden of showing that facts were considerably different because it was free to take "measures needed to restore stream flows, stabilize soils, or prevent erosion." [[538]](#footnote-539)538 Thus, Coeur Alaska had many options available to prevent environmental harm from the recent weather conditions short of constructing a permanent dam.

The Ninth Circuit denied Coeur Alaska's motion to vacate the preliminary injunction because 1) SEACC had demonstrated a likelihood of success on the merits, 2) SEACC had shown that it would suffer irreparable harm if the injunction was not granted, 3) the balance of hardship favored SEACC, and 4) it was in the public interest to prevent irreparable environmental harm. Further, the court determined that Coeur Alaska failed to meet its burden to have the injunction vacated because it could take steps short of building a permanent dam to prevent environmental harm caused by the weather conditions.

2. Northern California River Watch v. City of Healdsburg, 457 F.3d 1023 (9th Cir. 2006).

City of Healdsburg (the City) appealed a district court's judgment in favor of Northern California River Watch (River Watch) that found the City in violation of the Clean Water Act (CWA) [[539]](#footnote-540)539 for discharging sewage from a waste treatment plant into Basalt Pond (the Pond) without a permit. The precise issue was whether the Pond's waters and the surrounding area were subject to the CWA as "wetlands" "adjacent" to the Russian River (the River), a navigable river of the United States. The district court held that the Pond and its surrounding wetlands were subject to the CWA because they had a significant nexus to the River. The Ninth Circuit affirmed the district court's holding that the wetlands were covered by the CWA. The court also affirmed the district court's determination that two exceptions in the CWA, which the City had asserted as defenses, did not apply. The Ninth Circuit therefore held that the City, by discharging wastewater into the Pond without a National Pollutant Discharge Elimination System (NPDES) permit, had violated the CWA.

The Pond was actually a man-made pit filled with water, which an excavation company created by removing large amounts of sand and gravel **[\*754]** from an area of land near the River. The pit and the River both sat on top of the same underground aquifer, and the pit eventually filled with water up to the line of the water table, creating a man-made pond. Depending on the height of the River's water, the distance between its edge and the edge of the Pond varied between fifty and several hundred feet, but a levee separated the River and the Pond such that their waters usually had no surface connection.

The CWA protects "navigable waters," [[540]](#footnote-541)540 which the act defines as "waters of the United States." [[541]](#footnote-542)541 Regulations promulgated by the Army Corps of Engineers (the Corps) specify that "waters of the United States" include wetlands that are adjacent to "waters of the United States." [[542]](#footnote-543)542 The regulations define wetlands as "those areas that are inundated or saturated by surface or groundwater." [[543]](#footnote-544)543 The regulations further specify that "adjacent wetlands" include "wetlands separated from other waters of the United States by man-made dikes or barriers." [[544]](#footnote-545)544

In 1971, the City built a secondary waste treatment plant on the north side of the Pond, and in 1978, began discharging into the Pond. The City did not obtain an NPDES permit, and had only a state water emission permit and the permission of the Pond's landowner. The district court found that wastewater from the Pond percolated into the River through the wetlands, which filtered some pollutants and reduced the biochemical oxygen demand. Chloride, of which the Pond had high levels due to naturally occurring salts and the City's wastewater, reached the River in high concentrations. The court found that, in addition to these physical and chemical connections, the Pond and its wetlands were connected to the River ecologically because they supported the same bird, mammal, and fish species. The district court concluded that because the River was a navigable water under the CWA, the Pond and its wetlands were subject to the CWA: the Pond, the wetlands, and the River had sufficient chemical, physical, and ecological connections to trigger CWA jurisdiction. The court held that such connections satisfied the requirement under the Supreme Court's holding in United States v. Riverside Bayview Homes, Inc. (Riverside Bayview) that "the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act." [[545]](#footnote-546)545

On review, the Ninth Circuit first held that the Pond and its surrounding areas constituted wetlands under the CWA. The City argued that the Pond "should be characterized as an "adjacent waterbody,' but not an "adjacent wetland.'" [[546]](#footnote-547)546 The Ninth Circuit reasoned that such a distinction was **[\*755]** meaningless, because both the Pond and the wetlands, being "inundated or saturated by surface or groundwater," [[547]](#footnote-548)547 qualified as wetlands under the plain language of the regulations. The Ninth Court also rejected, without discussion, the possibility that the Pond and its wetlands were not covered by the CWA because they were man-made. [[548]](#footnote-549)548

The Ninth Circuit next addressed whether the Pond's wetlands, which were adjacent to the River, were subject to the CWA as "waters of the United States." [[549]](#footnote-550)549 The district court had held that such wetlands were waters of the United States subject to the CWA because they satisfied Riverside Bayview's significant nexus requirement. After the district court issued its decision, however, the U.S. Supreme Court issued Rapanos v. United States, [[550]](#footnote-551)550 which reexamined Riverside Bayview, but was a 4-4-1 plurality decision that provided no majority opinion. The Ninth Circuit followed Marks v. United States [[551]](#footnote-552)551 and relied on Justice Kennedy's Rapanos concurrence, which narrowed the holding of Riverside Bayview.

Justice Kennedy concluded in Rapanos that mere adjacency to navigable waters is not enough to make a wetland subject to the CWA. Rather there must be a "significant nexus," [[552]](#footnote-553)552 as described in Riverside Bayview, between the adjacent wetland and the navigable water. But, Kennedy narrowed Riverside Bayview by defining a significant nexus as existing "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more than readily understood as navigable." [[553]](#footnote-554)553 Justice Kennedy also specified that a "mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus." [[554]](#footnote-555)554 Justice Kennedy's concurrence also clarified that Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC), [[555]](#footnote-556)555 which held that wetlands are not subject to the CWA if they are not connected to other waters covered by the CWA, did not overrule Riverside Bayview.

The Ninth Circuit applied Kennedy's concurrence and reviewed the district court's factual findings. The Ninth Circuit held that the physical, **[\*756]** chemical, and ecological connections, which the district court had found existed between the Pond's wetlands and the River, were more than a mere hydrological link. Such connections, the Ninth Circuit held, sufficed as a significant nexus under Rapanos and justified the district court's finding that the Pond and its wetlands were subject to the CWA.

The Ninth Circuit also affirmed the district court's finding that two exceptions in the CWA did not apply to the Pond. The first exception provided that waste treatment systems are not waters of the United States. [[556]](#footnote-557)556 The court held this exception applies when the discharge is into a self-contained water body or into a water body already incorporated into a permitted treatment system. Because the Pond was neither self-contained nor part of an already-permitted system, the court held that this exception did not apply to the City's discharges into the Pond. The court also explained that, while this exception applies to discharges into waste treatment systems, "the CWA, however, still extends to discharges from treatment ponds." [[557]](#footnote-558)557

The Ninth Circuit then turned to the second exception, which applies to "waterfilled … pits excavated in dry land for the purpose of obtaining fill, sand, or gravel." [[558]](#footnote-559)558 The district court had held that this exception only applies to ongoing excavation operations and that there were no ongoing excavation operations at the Pond. The Ninth Circuit affirmed, explaining that, although the Pond was created through excavation, the exception did not apply because neither the City nor the owner of the Pond was currently using the Pond for excavation purposes.

The Ninth Circuit thus affirmed the district court's finding that a water-filled gravel pit and its wetlands, which a levee separated from a navigable river, were subject to the CWA because they had a significant nexus to the adjacent river. The Ninth Circuit also affirmed the district court's determination that two exceptions to the CWA did not apply. By those holdings, the court held that the City had violated the CWA by discharging wastewater into the Pond without an NPDES permit. In affirming the district court on the first issue, the court relied on Justice Kennedy's concurrence in Rapanos, making it the law for the Ninth Circuit. As a result, a wetland's adjacency to, or hydrologic connection with, a navigable water may not bring a wetland within the jurisdiction of the CWA. Rather, there must be a "significant nexus" between the wetland and the adjacent navigable water body.

**[\*757]**

II. Natural Resources

A. Endangered Species Act

1. ***Kern*** County Farm Bureau v. Allen, 450 F.3d 1072 (9th Cir. 2006).

***Kern*** County Farm Bureau (***Kern***), among others, appealed a judgment that the United States Fish and Wildlife Service (FWS) complied with the procedural requirements of the Administrative Procedure Act (APA) [[559]](#footnote-560)559 and the Endangered Species Act (ESA) [[560]](#footnote-561)560 when FWS incorporated information from three new studies in its Final Rule listing the Buena Vista Lake shrew (BVL shrew) (Sorex ornatus relictus) [[561]](#footnote-562)561 as endangered without reopening the comment period. The Ninth Circuit held that FWS sufficiently complied with the procedural requirements of both the APA and the ESA when it issued its final rule because 1) the new studies were not critical to FWS's decision, as the information in the studies only provided additional data to support FWS's original conclusions, 2) FWS relied on the best scientific data available in developing the Final Rule, and 3) FWS provided ample explanation of the relationship between the data and the Final Rule. The Ninth Circuit affirmed the district court's finding that there was no reason to invalidate the listing decision or require a new comment period.

On June 1, 2000, FWS published a Proposed Rule to list the BVL shrew as an endangered subspecies under the ESA. [[562]](#footnote-563)562 The Proposed Rule stated that the only known population of BVL shrews lived on private land, in wetland habitat, [[563]](#footnote-564)563 and the quantity and quality of available habitat had been reduced as a result of human activity. [[564]](#footnote-565)564 The rule concluded that the continued threats to the BVL shrew would likely result in the extinction of the subspecies. [[565]](#footnote-566)565 FWS opened a sixty day comment period, soliciting information about the threats to the subspecies, the existence of additional populations, and the size, genetics, range, and distribution of the known population. [[566]](#footnote-567)566 FWS opened a second sixty day comment period to allow general comment by interested parties. Additionally, FWS asked for the **[\*758]** expert opinion of five biology and ecology specialists. [[567]](#footnote-568)567 After the close of the comment period, but prior to the publication of the Final Rule, three new studies about the BVL shrew became available. However, FWS did not reopen comment on the Proposed Rule, but issued a Final Rule on March 6, 2002, listing the BVL shrew as endangered. [[568]](#footnote-569)568 While the Final Rule incorporated information from the new studies as well as comments, the reasons for listing the BVL shrew were essentially the same as those in the Proposed Rule, and the ultimate conclusion - that the BVL shrew should be listed as endangered - was the same. [[569]](#footnote-570)569

Under the APA, [[570]](#footnote-571)570 agencies must publish notice of rule making in the Federal Register to give interested persons the opportunity to comment on the proposed rule, which provides the agency with additional information when issuing the final rule. [[571]](#footnote-572)571 FWS, one of the agencies charged with administering the ESA, [[572]](#footnote-573)572 can undertake rulemaking to list a species as endangered if any one of the following five factors is satisfied: 1) "present or threatened destruction, modification, or curtailment of its habitat or range," 2) "over-utilization for commercial, recreational, scientific, or educational purposes," 3) "disease or predation," 4) "inadequacy of existing regulatory mechanisms," or 5) "other natural or man-made factors affecting its continued existence." [[573]](#footnote-574)573 The ESA requires that the decision to list a species as endangered be made exclusively on the "basis of the best scientific and commercial data available." [[574]](#footnote-575)574 Further, the agency must include a summary of the data used to support the regulation in the proposed or final rule and must explain the relationship between the data and the regulation. [[575]](#footnote-576)575

Following FWS's issuance of the Final Rule listing the BVL shrew as endangered, ***Kern*** brought suit, alleging that FWS failed to comply with specific procedural requirements of the APA and ESA by: 1) not reopening the comment period after the new studies became available, 2) not using the best available scientific data in making the listing decision, 3) not summarizing the data used in the decision, and 4) not showing the connection between the data and the decision.

The APA states that a court can only negate agency action if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" or undertaken "without observance of procedure **[\*759]** required by law." [[576]](#footnote-577)576 Under this deferential standard, a court cannot negate agency action if there is a reasonable basis for the agency's decision. [[577]](#footnote-578)577 Further, the Ninth Circuit noted that under this standard of review, the court is not permitted to substitute its judgment for the agency's judgment. [[578]](#footnote-579)578 When reviewing agency action for procedural compliance, the court reviews de novo, but is limited to ensuring that the agency adhered to "statutorily prescribed procedures." [[579]](#footnote-580)579 Additionally, the reviewing court awards no deference to the agency's opinion regarding the adequacy of the notice and comment procedure. [[580]](#footnote-581)580

The district court, following a bench trial, determined that the new studies provided supplemental data for the proposed rule. Accordingly, the court found that there was no reason to invalidate the listing and require a new comment period. [[581]](#footnote-582)581

The Ninth Circuit first addressed whether FWS provided sufficient notice and comment. The court began by noting that an agency is required to make available for comment data and studies used to formulate its decision. [[582]](#footnote-583)582 Accordingly, an agency commits procedural error if it does not disclose the scientific basis for the proposed rule with sufficient time for comment. [[583]](#footnote-584)583 However, agencies are not precluded from including additional documents in the final rule in response to comments. [[584]](#footnote-585)584 The Ninth Circuit looked to BASF Wyandotee Corp. v. Costle [[585]](#footnote-586)585 for the policy statement that agencies should be encouraged to add new information to the final rule without having to reopen the comment period. [[586]](#footnote-587)586 To support this position, the court turned to Idaho Farm Bureau Federation v. Babbitt [[587]](#footnote-588)587 for the proposition that "an agency, without reopening the comment period, may use supplementary data, unavailable during the notice and comment period, that expands on and confirms information contained in the proposed rulemaking and addresses alleged deficiencies in the pre-existing data, so long as no prejudice is shown." [[588]](#footnote-589)588

The Ninth Circuit then looked to Idaho Farm Bureau and Solite Corp. v. EPA [[589]](#footnote-590)589 to illustrate the circumstances that require an agency to reopen **[\*760]** comment when new data has become available. In Idaho Farm Bureau, the Ninth Circuit held that FWS made a procedural error in listing the Bruneau Hot Springs snail (Pyrgulopsis bruneauensis) as endangered when the agency did not reopen public comment after new information became available because the new information was the sole basis of information about the snail's habitat. The court determined that FWS had to reopen public comment because the agency's reliance on the study made the new information critical to the proposed rule and because the accuracy of the study was debatable. [[590]](#footnote-591)590 In Solite Corp v. EPA, the District Court for the District of Columbia determined that EPA did not commit procedural error by not reopening public comment even after new information became available that was used in the final rule. The court upheld EPA's determination that a new comment period was unnecessary because the new report merely replaced an older report, the data was not challenged, there was no indication that EPA tried to hide the report or acted in bad faith, the new data confirmed the previous conclusions, and the agency's methodology was constant throughout the rulemaking process. [[591]](#footnote-592)591

The Ninth Circuit then discussed each of the three new studies in turn. The first post-comment study (Maldonado I) was a genetic study of 251 shrews. The study stated that the shrew was one of the most threatened small mammals in California, and attributed this to the destruction of its habitat. The study did not change the taxonomy of the BVL shrew, noting that it was a subspecies. [[592]](#footnote-593)592 The second post comment study (Maldonado II), examined the morphological characteristics of over 500 shrew skulls. The study concluded that the subspecies analyzed corresponded to the existing subspecies divisions, and that the shrew should continue to be divided into the existing subspecies. [[593]](#footnote-594)593 The third post comment study (Status Report) found three additional BVL shrew populations and postulated about the habitat requirements of ornate shrews in general. The study concluded that while the continued presence of the BVL shrew depended on habitat conservation, [[594]](#footnote-595)594 the authors did not think the BVL shrew was, or would become, endangered.

In turning to the issue before the court, the Ninth Circuit rejected ***Kern***'s argument that the three new studies were critical to FWS's listing decision. The court analogized between the present case and Solite Corp., noting that ***Kern*** was not challenging the accuracy of the new studies, and there was no indication that FWS tried to conceal the new information from the public or act in bad faith. The court distinguished the present case from Idaho Farm Bureau, noting that the new information did not form the sole **[\*761]** basis for the listing decision. Instead, like Solite Corp., the new information from the three studies provided additional data and support for the conclusions already contained in the Proposed Rule.

Despite the similarity between the Proposed Rule and the Final Rule, ***Kern*** argued that an additional comment period was needed because the new studies 1) provided critical information on whether the BVL shrew was a distinct subspecies, 2) provided critical information on whether the BVL shrew was threatened with extinction, and 3) put the listing decision in doubt. The court addressed each of ***Kern***'s contentions individually.

The Ninth Circuit began by stating that for an animal to be listed as endangered under the ESA, the animal must first be classified as at least a distinct subspecies. [[595]](#footnote-596)595 In applying this requirement to the present case, the court concluded that the two new Maldonado studies were used to provide additional scientific support that the BVL shrew was a morphologically and genetically distinct shrew. The Ninth Circuit noted that the Proposed Rule cited an earlier study to support the conclusion that the BVL shrew was a distinct subspecies. [[596]](#footnote-597)596 The court concluded that the two Maldonado studies corroborated FWS's original conclusion that the BVL shrew was a distinct subspecies and were therefore not critical to the listing decision.

The Ninth Circuit then considered whether the studies provided critical information on the BVL shrew's danger of extinction "throughout all or a significant portion of its range." [[597]](#footnote-598)597 The Final Rule incorporated information from the Status Report that supported FWS's finding that few BVL shrews exist and multiple factors contribute to their risk of extinction. The Ninth Circuit acknowledged the relevance of the data obtained from the Status Report - the discovery of three new BVL shrew populations doubled the number of known shrews, and there was new information about the range and habitat needs of the BVL shrew. However, the court determined that the new information did not undermine the reasoning supporting FWS's listing decision. Instead, the Ninth Circuit concluded that because the new information provided additional support for FWS's underlying conclusions without varying them, the new information was not critical to FWS's listing decision.

The Ninth Circuit then addressed ***Kern***'s argument that the Status Report's conclusion that the BVL shrew should not receive endangered status threw doubt on the legitimacy of the listing decision. In spite of the Status Report's conclusion, FWS concluded that the information in the Status Report supported its decision to list the BVL shrew as endangered. The Ninth Circuit stated that FWS is not obligated to accept the conclusions of the Status Report, but FWS is obligated to use the data from the report to reach their decision. The court then noted that this challenge to the listing decision was substantive rather than procedural; ***Kern*** challenged the listing decision by questioning the degree to which the new studies undermined the **[\*762]** listing decision. The Ninth Circuit stated that because ***Kern*** only alleged procedural violations, the court could not hear the substantive issues.

The Ninth Circuit then turned to ***Kern***'s argument that FWS did not use the "best scientific and commercial data available" as required by the ESA. [[598]](#footnote-599)598 The court noted that in practice, this requirement only prevents an agency from ignoring scientific information that is better than the scientific information the agency relies on in formulating its rule. [[599]](#footnote-600)599 The Ninth Circuit looked to Building Industry Association of Superior California v. Norton for the proposition that an agency does not violate the ESA requirement to use the best scientific data available absent the omission of "superior data." [[600]](#footnote-601)600 The court noted that ***Kern*** did not argue that FWS excluded the three new studies from the Final Rule. ***Kern*** argued that FWS misconstrued the information in the three studies and because the three new studies questioned the listing decision, FWS had ignored the studies. The Ninth Circuit determined that the record showed the FWS had considered, discussed, evaluated and included the information from the new studies during the process of issuing the Final Rule.

The Ninth Circuit rejected ***Kern***'s final argument that FWS had violated the ESA [[601]](#footnote-602)601 by failing to summarize the information supporting the Final Rule and explain the relationship between the data and the Final Rule. To support their argument, ***Kern*** listed its questions to which FWS had not responded in issuing the Final Rule. The Ninth Circuit stated that FWS was under no requirement to respond to ***Kern***'s questions before issuing a Final Rule. The court then noted that the Final Rule was supported by the record, which contained data and explanation about the BVL shrew's population and range, and the multiple threats to the BVL shrew. Thus, the Ninth Circuit concluded that FWS satisfied the requirements of the ESA.

The Ninth Circuit concluded that FWS's listing decision was in compliance with procedural requirements of the APA and the ESA because 1) the new studies were not critical to FWS's decision, as the information in the studies only provided additionally data to support FWS's original conclusions; 2) FWS relied on the best scientific data available in developing the Final Rule; and 3) FWS provided ample explanation of the relationship between the data and the Final Rule. Therefore, the Ninth Circuit affirmed the district courts finding that there was no reason to invalidate the listing decision and require a new comment period.

2. Forest Guardians v. Johanns, 450 F.3d 455 (9th Cir. 2006).

Forest Guardians appealed a judgment, which held that the United States Forest Service (USFS) complied with the Endangered Species Act **[\*763]** (ESA) [[602]](#footnote-603)602 despite USFS's failure to re-initiate consultation with the United States Fish and Wildlife Service (FWS) after deficiently monitoring grazing utilization levels on pastures in the Water Canyon allotment within the Apache-Sitegreaves National Forest in Arizona. The Ninth Circuit reversed the district court's judgment and remanded the case for entry of summary judgment in favor of Forest Guardians, holding that USFS's failure to re-initiate consultation violated the ESA because the promulgated regulations require consultation when agency action is changed, and that change could affect an endangered species or habitat in ways not previously considered. [[603]](#footnote-604)603

Section 7 of the ESA prohibits government agencies from undertaking actions that would pose a risk to the continued existence of endangered species or their habitat. [[604]](#footnote-605)604 To ensure compliance, agency actions undertaken in an area where a listed endangered species may be present are subject to inter-agency consultation, [[605]](#footnote-606)605 either formal [[606]](#footnote-607)606 or informal. [[607]](#footnote-608)607 An agency does not have to enter the more rigorous formal consultation with FWS if the agency conducts informal consultation that indicates "the [agency] action is not likely to adversely affect listed species or critical habitat." [[608]](#footnote-609)608 However, the court discussed two relevant circumstances in which informal consultation must be re-initiated: 1) "if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered," [[609]](#footnote-610)609 or 2) "if the identified action is subsequently modified in a manner that causes an affect to the listed species or critical habitat that was not considered in the biological opinion." [[610]](#footnote-611)610

The court next turned to the factual and procedural background. In 1997, Forest Guardians brought suit challenging USFS's issuance of over a thousand grazing permits allowing grazing on allotments on national forest land in Arizona and New Mexico, and alleging USFS did not consult with FWS as required by the ESA prior to granting the permits. Following the 1997 suit, USFS and FWS created guidance criteria for reviewing USFS management of the targeted land allotments. Meeting the criteria allowed USFS to presume a FWS finding of "not likely to adversely affect listed species or critical habitat." The Water Canyon Allotment, which covers 52,000 acres of the Apache-Sitgreaves National Forest in Arizona, was one of the allotments for which USFS and FWS established guidance criteria. The Water Canyon criteria required USFS to monitor the use levels of each grazed pasture halfway through the grazing period. Additionally, the guidance criteria recommended that USFS monitor the utilization level in the pastures at the beginning and end of the grazing periods. If USFS **[\*764]** confirmed each year that the guidance criteria were being met, it could presume an FWS finding that grazing in the Water Canyon allotment was "not likely to adversely affect listed species or critical habitat." With the guidance criteria in effect, USFS granted Water Canyon grazing permits on June 11, 1999. However, USFS monitored only one pasture in 1999 and 2000, two in 2001, and one in 2002, while three or more were grazed in each of those years. The results revealed higher utilization levels than permitted in three instances. Nevertheless, USFS and FWS did not re-initiate consultation and USFS continued to enter annual findings on behalf of FWS that grazing in Water Canyon was "not likely to adversely affect listed species or critical habitat."

Forest Guardians brought this lawsuit in April 2001, alleging that USFS violated the ESA by not re-initiating consultation after failing to adequately monitor numerous grazed allotments. More specifically, Forest Guardians alleged that USFS's failure to monitor utilization levels on various grazing allotments, including Water Canyon, invalidated FWS's annual concurrence that the grazing was "not likely to adversely affect listed species or critical habitat."

The district court found that the ESA and its promulgated regulations did not require re-initiation of consultation between the agencies because the total number of cattle pairs grazing the pastures was lower than allowed. Thus, the district court reasoned, the lower cattle pair levels supported a finding that grazing in Water Canyon was "not likely to adversely affect listed species or critical habitat" despite the USFS's deficient monitoring. [[611]](#footnote-612)611

The Ninth Circuit first addressed whether the case had become moot because USFS and FWS had re-initiated consultation. [[612]](#footnote-613)612 A case is moot if there is no longer a controversy, [[613]](#footnote-614)613 but a case is not moot if "any effective relief may be granted." [[614]](#footnote-615)614 The party claiming mootness has the burden of showing that the court cannot provide an effective remedy. [[615]](#footnote-616)615 The Ninth Circuit stated that the present case dealt with a continuing practice; that is, to allow grazing to continue on the Water Canyon allotment for the remainder of the ten-year permit USFS needed to receive an annual FWS finding of "not likely to adversely affect." [[616]](#footnote-617)616 Additionally, the court noted the high likelihood of USFS's not meeting the future monitoring requirements despite the agencies' re-initiation of informal consultation. The court then determined that declaratory judgment was an effective available remedy to Forest Guardians, because declaratory judgment would prohibit the Forest **[\*765]** Service from violating the ESA for the remaining years of the permits on the allotment. [[617]](#footnote-618)617

The court then turned to the central issue, whether USFS violated section 7 of the ESA by not re-initiating consultation with FWS following USFS's inadequate monitoring. [[618]](#footnote-619)618 The ESA's promulgated regulations require agencies to re-initiate consultation if an agency changes its actions in a way not previously considered that may impact a listed species or critical habitat. [[619]](#footnote-620)619 The agency is charged with showing that the agency action is "not likely to adversely affect listed species or critical habitat." [[620]](#footnote-621)620 In drawing an analogy between the present case and Sierra Club v. Marsh, [[621]](#footnote-622)621 the Ninth Circuit reasoned that proper monitoring of the utilization levels of the pastures in the Water Canyon allotment was necessary to a FWS finding that grazing was "not likely to adversely affect listed species or critical habitat." Because USFS's failure to monitor the utilization levels affected listed species "in a way or to a degree not previously considered," USFS and FWS were required to re-initiate consultation.

The Ninth Circuit rejected USFS's argument that its failure to monitor the utilization levels was a "minor dispute" that did not require re-initiation of consultation. [[622]](#footnote-623)622 The court stated that sufficient monitoring of utilization levels was central to FWS's determination of "not likely to adversely affect listed species or critical habitat." To support its proposition, the court pointed to a USFS memorandum stating the critical link between monitoring and agency determinations. The Ninth Circuit also looked to Gifford Pinchot Task Force v. United States Fish & Wildlife Service [[623]](#footnote-624)623 to support its position that affirmative evidence showing ineffective monitoring can invalidate agency conclusions. The Ninth Circuit then considered the USFS monitoring record, which revealed incomplete monitoring and over-utilization, and determined that the evidence was sufficient to invalidate the agency's "not likely to adversely affect" conclusion on the Water Canyon allotments.

**[\*766]** The Ninth Circuit also rejected USFS's argument that the monitoring requirements under the guidance criteria were "unreasonable." The court rejected this argument principally because USFS and FWS had designed the guidance criteria and jointly agreed that compliance with the monitoring standards and conforming utilization levels were pre-requisites to an FWS finding that grazing was "not likely to adversely affect listed species or critical habitat."

Finally, the Ninth Circuit rejected USFS's argument that the district court was correct in finding that a lower number of cattle grazing the pastures would result in acceptable utilization levels. The Ninth Circuit stated that there was no evidence in the record to support the correlation between the number of livestock grazing a pasture and the utilization level. To the contrary, the 2002 recording indicated that with only seventy-four pairs of cattle, a dozen pairs fewer than contemplated, the utilization level on two sites was nonetheless over the allowable level.

The Ninth Circuit concluded that the ESA required USFS to re-initiate informal consultation with FWS because not only was the monitoring deficient but the results of the monitoring indicated over-utilization, which amounted to modifications to the allotment guidance criteria that may impact a listed species. While the court stated that not every departure from the Water Canyon guidance criteria required re-initiation of consultation, the court noted that the deviations before the court were numerous and material. Therefore, USFS's failure to re-initiate consultation with FWS was a violation of the ESA. The Ninth Circuit reversed the district court's judgment and remanded the case for entry of summary judgment in favor of Forest Guardians.

3. Defenders of Wildlife v. United States Environmental Protection Agency, 420 F.3d 946 (9th Cir 2005), en banc, reh'g denied, 450 F.3d 394 (9th Cir 2006).

The Ninth Circuit denied a petition from the United States Environmental Protection Agency (EPA) for en banc reconsideration of the Ninth Circuit's 2005 decision in Defenders of Wildlife v. EPA (Defenders). [[624]](#footnote-625)624 Defenders concerned EPA's decision to transfer to Arizona the authority to issue National Pollution Discharge Elimination System (NPDES) permits under the Clean Water Act (CWA). [[625]](#footnote-626)625 The precise issue was whether EPA's decision to transfer authority, for which the CWA only requires fulfillment of nine criteria, was also subject to the requirements of the Endangered Species Act (ESA). [[626]](#footnote-627)626 The court held that transferring NPDES authority to a state required ESA compliance, and EPA's finding to the contrary was arbitrary and capricious. [[627]](#footnote-628)627 EPA petitioned for en banc reconsideration and **[\*767]** the court denied the request, but an impassioned and divided court memorialized its rationale in a concurrence from Judge Berzon and dissents from Judges Kozinski and Kleinfeld.

Arizona applied to take over permitting authority of NPDES permits from EPA. The CWA states that EPA "shall" transfer permitting authority to a state, if the state's application meets nine exclusive criteria, none of which relate to the ESA. [[628]](#footnote-629)628 There was no question that Arizona's application fulfilled the nine criteria, but EPA's regional and local offices became concerned that the transfer decision might implicate section 7 of the ESA. Section 7 mandates that federal agencies insure their actions do not jeopardize endangered species or critical habitats. [[629]](#footnote-630)629 Section 7 does not, however, apply to state actions or to non-discretionary actions.

The regional EPA office publicly stated that section 7 applied to the transfer decision, and the national office took control of the matter and complied with the ESA's requirements. Pursuant to section 7, the regional EPA office consulted with the United States Fish and Wildlife Service (FWS). [[630]](#footnote-631)630 The issue was then elevated to the national level and FWS subsequently issued a Biological Opinion (BiOp) on whether the transfer would jeopardize any endangered species or critical habitats. The BiOp concluded that any impacts the transfer decision would have on endangered species were unavoidable because EPA had no authority to consider section 7 in a CWA transfer decision. EPA relied on the finding of no jeopardy in FWS's BiOp and transferred permitting authority to Arizona.

Defenders of Wildlife filed suit, and the Ninth Circuit held that EPA's decision to transfer CWA permitting authority to Arizona was in error. [[631]](#footnote-632)631 The court reasoned that it was "internally inconsistent" [[632]](#footnote-633)632 for the EPA to first fulfill section 7's requirements by consulting with FWS and to later decide, based on the BiOp that resulted from its consultations with FWS, that it had no authority to consider the ESA. The court vacated EPA's transfer decision and remanded the case to the district court for consideration consistent with the court's holding.

EPA petitioned for en banc reconsideration, but the court denied the request. Judge Berzon, who wrote the opinion for the majority in Defenders, wrote a concurrence for the denial of reconsideration, and Judge Kozinski wrote for the dissent. [[633]](#footnote-634)633 Kozinski, arguing that reconsideration was warranted, took issue with five particular points of the majority's opinion in Defenders. His lengthy dissent appears to have led Berzon to write a concurrence in anticipation of Supreme Court review, as she began her **[\*768]** concurrence with a statement of purpose, saying "[a] practice has developed in this court of writing dissents from denial of rehearing en banc reconsideration as a matter of routine. Those dissents sometimes read more like petitions for writ of certiorari than judicial opinions of any stripe." [[634]](#footnote-635)634 She explains that such dissents "pose a dilemma for those who believe the original opinion correct, as they may raise issues not addressed by that opinion because not articulated by the parties before the petition for rehearing stage - or ever." [[635]](#footnote-636)635

Judge Kozinski's first issue with the majority opinion in Defenders was "that it mistook EPA's internal deliberations for analytical inconsistency." [[636]](#footnote-637)636 Kozinski argued that what the majority opinion saw as internal inconsistencies were merely steps in the decision-making process. He explained that the only "inconsistency" [[637]](#footnote-638)637 was between the regional EPA office's interpretation of the ESA and the national office's interpretation, and this seeming inconsistency was, in actuality, "EPA changing its mind upon further reflection at a higher level." [[638]](#footnote-639)638 According to Kozinski, "there was no inconsistency in the agency's final action, which is the only one … entitled to review." [[639]](#footnote-640)639 Berzon argued Kozinski denied EPA had ever maintained that the ESA required consultation for transfer decisions, while Kozinski saw EPA's change in position as part of EPA's deliberations. Berzon further argued that the law "does not provide an agency two chances to consider a factual or legal question … , only one." [[640]](#footnote-641)640 Kozinski's second argument for reconsideration was that Defenders had not given "appropriate deference to FWS's interpretation of the ESA." [[641]](#footnote-642)641 Kozinski argued that FWS's BiOp finding that EPA's transfer of NPDES permitting authority to Arizona would not cause jeopardy to endangered species because EPA could not consider the ESA in the decision was entitled to deference. Berzon countered that FWS's interpretation of the ESA required an interpretation of the CWA, and, because FWS has no regulatory power over the CWA, its interpretation was not entitled to deference.

Kozinski next argued that Defenders had mistakenly treated the ESA as if it trumped the CWA, and he argued that the ESA's regulations limit its application to only "discretionary Federal involvement or control." [[642]](#footnote-643)642 Kozinski stated that the language of the CWA transfer provision, which uses "shall," contemplates a non-discretionary decision and the ESA therefore did not apply. Berzon concentrated on the plain language of the ESA, which says that it applies to any "action authorized, funded, or carried out by the agency." [[643]](#footnote-644)643 Berzon argued that, under Chevron U.S.A. v. Natural Resources **[\*769]** Defense Counsel, [[644]](#footnote-645)644 an interpretative regulation may not contravene a "perfectly clear statutory requirement." [[645]](#footnote-646)645 Berzon also pointed out that because Congress enacted the ESA after the CWA, the CWA should be subject to later-enacted legislation.

Kozinski's fourth argument was that the Supreme Court's unanimous decision in Department of Transportation v. Public Citizen [[646]](#footnote-647)646 directly contradicted the majority's holding in Defenders. Public Citizen presented the issue of whether the Federal Motor Carrier Safety Administration (FMCSA), which regulates motor carriers, must follow the procedural requirements of the National Environmental Protection Act (NEPA) [[647]](#footnote-648)647 in deciding whether to grant registration to Mexican trucks that enter the United States. "FMCSA's governing statute, like the CWA, instructs that the agency "shall' grant registration to any carrier meeting certain criteria, none of which involves environmental concerns." [[648]](#footnote-649)648 The Supreme Court held that FMCSA's decision to grant registration to Mexican trucks was not subject to NEPA because it was a non-discretionary decision and the procedural requirements of NEPA could not affect the decision. The Supreme Court said that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant "cause' of the effect." [[649]](#footnote-650)649 Thus, because FMCSA's decision was non-discretionary, the procedural requirements of NEPA could not affect the outcome and thus did not apply.

Kozinski argued that Defenders was indistinguishable from Public Citizen because the ESA says EPA "shall" transfer authority if a state's application fulfills the CWA's nine criteria; therefore the transfer decision was non-discretionary and the requirements of the ESA did not apply. Berzon, on the other hand, argued that Kozinski misunderstood Public Citizen. She determined that Public Citizen did not control the disposition of Defenders, because Defenders involved the ESA and not NEPA. She noted that NEPA contains no requirement that its procedural requirements actually influence an agency's actions, while the ESA contains substantive requirements as well as procedural requirements. Thus, Berzon concluded that because the ESA, unlike NEPA, is "a partially substantive statute" [[650]](#footnote-651)650 Public Citizen is distinguishable from Defenders and did not control the court's decision in Defenders.

Berzon also argued that Kozinski ignored Defenders' reliance on Tennessee Valley Authority v. Hill (TVA v. Hill), [[651]](#footnote-652)651 which, she believed indicates that the ESA, "affirmatively commands all federal agencies "to **[\*770]** insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence' of an endangered species." [[652]](#footnote-653)652

Kozinksi's final point of contention was that the majority's opinion in Defenders created a conflict between the Ninth Circuit and the Fifth and D.C. Circuits. He pointed to American Forest & Paper Ass'n v. U.S. Environmental Protection Agency (American Forest) [[653]](#footnote-654)653 from the Fifth Circuit and the D.C. Circuit case on which it relied, Platte River Whooping Crane Critical Habitat Maintenance Trust v. Federal Energy Regulatory Commission. [[654]](#footnote-655)654 Kozinski argued that American Forest presented the same question as Defenders: whether the CWA's nine criteria for transferring NPDES permitting authority to a state are exclusive, or whether the ESA is an additional tenth criterion. American Forest held that the EPA lacked the authority to add additional requirements not already contained in the CWA. Berzon argued that those cases are inapposite because they relied on sections 7(a)(1) of the ESA, while Defenders concerned section 7(a)(2). [[655]](#footnote-656)655 Berzon also pointed out that a conflict between circuits had already existed, and the Ninth Circuit was merely taking sides with the circuits [[656]](#footnote-657)656 that hold "that agencies do have to comply with the [ESA] as well as their own governing statutes … ." [[657]](#footnote-658)657

Judge Kleinfeld joined in Kozinski's dissent but also dissented separately to note the simplicity of the case. Kleinfeld stated that the CWA mandates the EPA to transfer permitting authority if the transfer application fulfills nine criteria, and the court does not have the authority to add a tenth criterion.

**[\*771]** The court's denial of en banc reconsideration means that the original Defenders opinion remains the law for the Ninth Circuit. Defenders held that EPA's decision to transfer permitting authority to Arizona was in error because it was based upon a BiOp that said the ESA did not apply to the transfer decision. Thus, decisions concerning the transfer of NPDES permitting authority must comply with the ESA, and the CWA's nine criteria for such decisions are not exclusive.

4. California Sportfishing Protection Alliance v. Federal Energy Regulatory Commission, 472 F.3d 593 (9th Cir. 2006).

California Sportfishing Protection Alliance (California Sportfishing) petitioned the Ninth Circuit for review of the Federal Energy Regulatory Commission's (FERC) decision not to initiate formal consultation with the National Marine Fisheries Service (NMFS) under the Endangered Species Act (ESA), [[658]](#footnote-659)658 regarding the impact of the continued operation of the DeSabla-Centerville project, operated by Pacific Gas and Electric (PG&E), on threatened Chinook salmon. The Ninth Circuit upheld FERC's decision to not consult with NMFS, holding that because the DeSabla-Centerville project was operating under an existing thirty-year license, there was no affirmative agency action to trigger consultation under the ESA.

In 1980, FERC issued PG&E a thirty year license to operate the DeSabla-Centerville project in Butte County, California. The project is made up of dams, reservoirs, canals, and powerhouses along Butte Creek that generate hydroelectric power. Operation of the dams impacts the flow of the creek, which serves as spawning grounds for Chinook salmon. Under the license to operate the project, FERC may require PG&E to alter operations to protect fish and wildlife. In 1999, Chinook salmon were listed as a threatened species under the ESA. [[659]](#footnote-660)659 Following major fish kills in Butte Creek in 2002 and 2003, NMFS asked FERC to begin formal consultation pursuant to the ESA to determine the impact of the project on Chinook salmon. However, FERC did not initiate formal consultation. [[660]](#footnote-661)660 California Sportfishing then petitioned FERC to initiate consultation in 2004; FERC denied the petition, as well as a subsequent petition for rehearing. California Sportfishing petitioned the Ninth Circuit to review FERC's decision not to initiate formal consultation and PG&E intervened to defend the agency's denials.

The ESA requires consultation between an agency undertaking an action and NMFS to "insure that any action authorized, funded, or carried out by such agency … is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or **[\*772]** adverse modification of habitat of such species." [[661]](#footnote-662)661 Formal consultation produces a Biological Opinion (BiOp), wherein NMFS determines whether the action will jeopardize a threatened or endangered species, or destroy or adversely modify critical habitat. [[662]](#footnote-663)662 If NMFS determines that the action will either jeopardize a threatened or endangered species, or destroy or modify critical habitat, NMFS must issue "reasonable and prudent" alternatives to the action [[663]](#footnote-664)663 as well as an "incidental take" statement, [[664]](#footnote-665)664 which allows the action agency to take endangered or threatened species provided that the alternatives are implemented and the action agency complies with the incidental take statement. [[665]](#footnote-666)665

The Ninth Circuit first considered whether it had jurisdiction to hear the case, rejecting PG&E's argument that it lacked jurisdiction because FERC and NMFS had begun preliminary consultation in anticipation of renewal of the license in 2009. The court stated that it had jurisdiction to review a FERC order under the Federal Power Act [[666]](#footnote-667)666 if the order is "(1) [] final, (2) if review would not invade the discretion of the agency, and (3) if, absent review, the petitioner would suffer irreparable harm." [[667]](#footnote-668)667 Finding the order both final and that review would not upset the exercise of FERC's discretion, the court considered whether California Sportfishing would suffer harm if review was withheld. PG&E claimed that California Sportfishing would not suffer harm because consultation was under way as part of the 2009 license renewal process, and would result in a BiOp outlining how to protect Chinook salmon under the renewed license. The Ninth Circuit rejected PG&E's argument, pointing out that California Sportfishing petitioned for consultation to determine what steps could be taken under the existing license to protect the Chinook salmon, not under the future license. Further, the court pointed out that the BiOp to be produced as part of the renewal proceedings would only legally apply to the renewed license, not the existing license. Thus, FERC's suggestion that it would implement any suggestions from the BiOp prior to 2009 had no legal significance. Therefore, the court determined that California Sportfishing would suffer irreparable harm if review was withheld, and accordingly, the court had jurisdiction to review FERC's denials.

The court then turned to what it identified as the dispositive issue: "whether there was any "action authorized, funded, or carried out' by a federal agency, that would have triggered the ESA's consultation requirement in 1999." [[668]](#footnote-669)668 The court pointed out that the language of both the statute and its **[\*773]** implementing regulations look to the future effect of an agency action, leading to the conclusion that only an agency action triggers consultation, not the listing of a species. The court looked to Tennessee Valley Authority v. Hill [[669]](#footnote-670)669 to provide additional support. In that case, the Supreme Court ordered that a dam not begin operation because it would destroy the habitat of the snail darter, an endangered species. The Ninth Circuit pointed out that the Supreme Court focused on the future impact of the action - beginning to operate the dam. The Ninth Circuit also looked to Bennett v. Spear [[670]](#footnote-671)670 for support, where the Court determined that formal consultation is required when proposed action will negatively impact a listed species.

Responding to California Sportfishing's argument that PG&E's continued operation of the project was an agency action under the statute, the Ninth Circuit defined the issue as "whether such ongoing operations are [] subject to the ESA." [[671]](#footnote-672)671 The court rejected California Sportfishing's reliance on Turtle Island Restoration Network v. National Marine Fisheries Service, [[672]](#footnote-673)672 a case involving the impact on sea turtles of the continued issuance of fishing permits. In that case, the Ninth Circuit determined that when the turtles were listed under the ESA, the agency had to consider the impact of the future permits on the species. [[673]](#footnote-674)673 It was significant to the court that previously issued permits were not affected by the listing decision. In the present case, there was no continuing agency program that issued new permits; there was only continued operation of a project subject to a previously issued license.

The court analogized the present case to both Sierra Club v. Babbitt [[674]](#footnote-675)674 and Environmental Protection Information Center v. Simpson Timber Co. [[675]](#footnote-676)675 In Sierra Club, consultation was not required because the agency had already issued the logging company a right of way. [[676]](#footnote-677)676 In Simpson Timber, consultation was not required because the agency had already granted the logging contractor an incidental take permit. [[677]](#footnote-678)677 The court stated that similar to the present case, in both Sierra Club and Simpson Timber, the action of granting the permit was complete.

The court then turned to Western Watersheds Project v. Matejko [[678]](#footnote-679)678 for the proposition that "Ninth Circuit cases have emphasized that section 7(a)(2) consultation stems only from "affirmative actions' of an agency." [[679]](#footnote-680)679 The court pointed out that like the agency in Western Watersheds, FERC had **[\*774]** not proposed any affirmative action to trigger formal consultation. To the contrary, PG&E, a private entity, continued to operate the DeSabla-Centerville project.

The court also rejected California Sportfishing's reliance on Pacific Rivers Counsel v. Thomas, [[680]](#footnote-681)680 which involved Land and Resource Management Plans (LRMPs) that controlled projects in two national forests. In that case, the Ninth Circuit determined that following the listing of the Chinook salmon as endangered, the U.S. Forest Service had to initiate consultation on the LRMPs because they impacted all future projects in the national forests. [[681]](#footnote-682)681 Thus, the court determined that the LRMPs were "ongoing agency action" that had "an ongoing and long-lasting effect." [[682]](#footnote-683)682 The court distinguished the present case from Pacific Rivers Council on the grounds that there was nothing that had a long-lasting effect on new permits. To the contrary, the action at issue was completed in 1980, with FERC's issuance of the license to PG&E.

In support of the determination that operation under a license is not an agency action, the court looked to the definition of "action" contained in the ESA regulations. The regulations define "action" to include "the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid." [[683]](#footnote-684)683 Under this definition, issuing the license to PG&E was the agency action that would have triggered formal consultation, not continued operation under the license.

The Ninth Circuit rejected California Sportfishing's final argument that two reopener provisions in PG&E's license allow discretionary federal control over the license, thereby requiring formal consultation because "Section 7's requirements apply to all actions in which there is "discretionary Federal involvement or control.'" [[684]](#footnote-685)684 The court determined that because the reopener provisions give FERC discretion to decide if it wants to exercise discretion, [[685]](#footnote-686)685 the provisions do not give FERC the requisite "involvement or control" to require consultation.

The Ninth Circuit concluded that FERC was not required to initiate consultation with NFMS because PG&E's continued operation of the hydroelectric project under a license issued in 1980 was not ongoing agency action under the ESA. Therefore, the court denied the petition for review.

5. Center for Biological Diversity v. Kempthorne, 466 F.3d 1098 (9th Cir. 2006).

The Center for Biological Diversity and Pacific Rivers Council (collectively "the Center") appealed a grant of summary judgment after a **[\*775]** district court found that the United States Fish and Wildlife Service (FWS) sufficiently complied with the mandates of the Endangered Species Act [[686]](#footnote-687)686 when determining that listing the Sierra Nevada Mountain Yellow-Legged Frog (Rana muscosa) (the Frog) as endangered was "warranted but precluded." [[687]](#footnote-688)687 The Ninth Circuit held that because FWS did not publish the "warranted but precluded" finding in the Federal Register together with an explanation of the agency's reasoning and the information relied on, FWS violated the express provisions of the ESA. [[688]](#footnote-689)688

On February 8, 2000, the Center petitioned FWS to list the Frog as endangered, stating that while the Frog population had once been plentiful, the current population had significantly diminished. On October 12, 2000, FWS published the ninety-day notice that the Center's petition contained sufficient information to potentially warrant listing the Frog as endangered, [[689]](#footnote-690)689 and began a status review to determine whether to list the Frog.

The ESA mandates that FWS complete the status review within twelve months of receipt of the petition. [[690]](#footnote-691)690 FWS failed to meet this deadline and the Center filed suit, resulting in a court order that FWS finish the status review by January 10, 2003. [[691]](#footnote-692)691 FWS missed its deadline again, but published its findings on January 16, 2003 (Frog Decision). [[692]](#footnote-693)692 The decision includes biological information about the Frog, its habitat, the impact of species extinction, and issues impacting population. Based on this information, FWS found that the Frog population was in decline and geographically isolated populations were likely to disappear completely. Thus, FWS concluded that the Frog deserved to be listed as endangered under the ESA.

Despite the FWS finding that the Frog warranted listing, FWS determined that listing the Frog was "precluded by other higher priority listing actions." [[693]](#footnote-694)693 Under the ESA, FWS can find a species listing "warranted but precluded" by showing that: 1) immediate listing of the species is precluded by other listing petitions FWS is currently considering, [[694]](#footnote-695)694 and 2) that FWS is acting expeditiously on pending listing or delisting decisions. [[695]](#footnote-696)695 In the Frog Decision, FWS stated the Frog listing was precluded because the agency allocated all of its resources to complying with court orders and **[\*776]** settlements, and used all remaining funds for emergency and high priority listings. [[696]](#footnote-697)696 However, FWS listed the Frog as a "candidate" for future listing; [[697]](#footnote-698)697 a "candidate" species is a species, on which FWS maintains the necessary information to list the species as endangered in the future, but current listing is precluded by other agency actions. [[698]](#footnote-699)698 Each year, FWS issues a Candidate Notice of Review (CNOR), which discusses the entire listing program, steps made to address the listing backlog, and specific candidate species. [[699]](#footnote-700)699 While the 2002 CNOR discussed species proposed for listing and the restrictions on additional listing actions, [[700]](#footnote-701)700 the Frog was first discussed in the 2003 CNOR. [[701]](#footnote-702)701

The district court entered summary judgment for the defendant, finding that reasons for the "warranted but precluded" determination could be derived from looking at the 2002 CNOR, which indicated that FWS made an implied finding that pending actions were consuming the budget and that expeditious progress was being made with respect to the listing backlog.

The Ninth Circuit first considered the statutory prerequisites that allow FWS to make a "warranted but precluded" finding and determined that the ESA requires the agency to publish the finding in the Federal Register accompanied by an explanation of the reasons and information supporting the finding. [[702]](#footnote-703)702 The court then turned to Center for Biological Diversity v. Norton, [[703]](#footnote-704)703 to illustrate the instances under which FWS can make a "warranted but precluded" finding. In that case, the Ninth Circuit stated that the ESA mandates FWS: 1) show that it is working on pending petitioned actions and publish a finding that these actions in fact preclude the petitioned listing, and 2) show that it is making "expeditious progress" in other listing or delisting decisions, [[704]](#footnote-705)704 and this information must be included in the agency findings. In the present case, FWS failed to include a discussion of the reasons precluding the Frog from being listed and the supporting data with its finding of "warranted but precluded." The Ninth Circuit determined that because the Frog decision did not include the required statutory elements, the court could not uphold the agency's decision. [[705]](#footnote-706)705

**[\*777]** FWS argued that the Frog Decision was sufficiently supported by the 2002 CNOR's indications that FWS made a finding that other pending actions precluded listing the Frog. The Ninth Circuit rejected this argument because FWS did not follow the procedures required by the statute. The court determined that the statute requires the listing decision to be published "together with" the findings; because the 2002 CNOR was published six months before the Frog Decision, they were not published together. Additionally, the Frog Decision did not reference the 2002 CNOR. The court turned to Securities Exchange Commission v. Chenery Corp. [[706]](#footnote-707)706 for the proposition that courts cannot validate an agency action by inserting a sufficient basis for the decision when the basis was lacking in the agency's decision. [[707]](#footnote-708)707 The court stated that because FWS did not publish the Frog decision with the accompanying reasons and data as required by the ESA, it was invalid. Due to the procedural deficiencies, the court did not address whether the 2002 CNOR satisfied the requirement that the agency show it was working on proposed actions that actually preclude the species listing at issue.

The Ninth Circuit also rejected FWS's argument that the 2002 CNOR qualified as the requisite finding of "expeditious progress" supporting the "warranted but precluded" finding because they were not published together. The court turned to the language of the statute, which says that the agency "shall" make findings, [[708]](#footnote-709)708 determining that the language requires an agency to make findings at the time of the decision and to publish the "expeditious progress" finding along with the decision. [[709]](#footnote-710)709

The court rejected FWS's final argument that the 2003 CNOR addressed any shortcomings of the Frog decision because the 2003 CNOR was not published concurrently with the Frog decision. The court noted that the statute requires the agency to make its findings within twelve months of receipt of the petition, [[710]](#footnote-711)710 and the 2003 CNOR was published beyond that deadline. The Ninth Circuit stated that it is not the place of the court to undermine a statutorily imposed deadline. [[711]](#footnote-712)711

The Ninth Circuit concluded that because the "warranted but precluded" finding was not published in the Federal Register together with an explanation of the agency's reasoning and the information relied and a statement that the agency was achieving "expeditious progress" in other listing decisions, FWS violated the express provisions of the ESA. [[712]](#footnote-713)712 The court was careful to note that it did not address whether the "warranted but precluded" determination was invalid for any other reasons. The court also **[\*778]** determined that based on the reasons underlying its decision, there were no grounds to order FWS to list the Frog.

6. Center for Biological Diversity v. United States Fish & Wildlife Service, 450 F.3d 930 (9th Cir. 2006).

The Center for Biological Diversity (CBD) sued the United States Fish and Wildlife Service (the Service) challenging the Service's failure to designate critical habitat under the Endangered Species Act (ESA) [[713]](#footnote-714)713 for the unarmored three spine stickleback (stickleback) - an endangered, scale-less fish. CBD claimed: 1) the Service violated the ESA by failing to complete the designation of critical habitat for the stickleback; 2) the Service violated the ESA and its regulations by issuing an incidental take statement (ITS) for the stickleback to CEMEX, a mining company to which the Bureau of Land Management (BLM) issued a mining permit for an operation affecting stickleback habitat; and 3) the Service's eventual finding that critical habitat should not be designated for the stickleback was arbitrary and capricious. The Ninth Circuit denied all of CBD's claims and affirmed the district court's grant of summary judgment in favor of the Service and CEMEX.

The Service listed the stickleback as an endangered species under the ESA in 1970. [[714]](#footnote-715)714 Found in southern California, the stickleback's nesting success depends on gentle water flow. To protect areas with appropriate water flow, the Service proposed, in 1980, to designate three stream zones of the Santa Clara watershed as critical habitat, but did not complete the designation. In 1990, BLM awarded CEMEX a contract to mine a location that would require pumping water from the Santa Clara River. The project had the potential to significantly impact the stickleback by causing the stream to run dry during particularly dry periods. Therefore, BLM initiated formal consultation with the Service under the ESA and submitted a final biological assessment of the project in June, 1996. After reviewing the assessment, the Service issued a biological opinion in January, 1998 concluding that the project was "not likely to jeopardize the continued existence of the stickleback" and including an ITS that, if followed, would allow a taking of the species under Section 9 of the ESA. [[715]](#footnote-716)715 The opinion also required CEMEX to take "reasonable and prudent measures" to minimize incidental take of stickleback including monitoring waters levels in the Santa Clara River and, if necessary, stopping the pumping to preserve stickleback habitat. This opinion ended the formal consultation process between BLM and the Service.

CBD filed suit in 2002, claiming that the Service violated the ESA by not completing the designation of critical stickleback habitat and violated the ESA and its regulations by issuing an ITS to CEMEX, who intervened as a **[\*779]** defendant based on its interest in the mining project. Soon thereafter, on September 11, 2002, the Service published its finding that critical habitat should not be designated for the stickleback (Finding). [[716]](#footnote-717)716 CBD amended its complaint challenging the Finding as arbitrary and capricious.

The district court granted summary judgment for the Service and CEMEX finding CBD's original claim moot and rejecting CBD's other claims. The court concluded that the Service had discretion to not designate critical habitat and that it did not violate the ESA by issuing the ITS. In addition, the district court granted motions to strike CBD exhibits that were not part of the administrative record. CBD appealed and the Ninth Circuit reviewed de novo.

The Ninth Circuit first dealt with CBD's three challenges to the Service's Finding: 1) the Service exceeded its authority by not making the designation of critical habitat "to the maximum extent prudent and determinable"; [[717]](#footnote-718)717 2) the Service failed to articulate a rational connection between the facts and its decision and therefore the Finding was arbitrary and capricious; and 3) the Finding was invalid because the Service did not provide for notice and comment.

In regards to the first challenge, the court held that the Service's designation of critical habitat was not mandatory, but discretionary. The section of the ESA cited by CBD mandates that critical habitat be designated at the time of the species listing, [[718]](#footnote-719)718 but that section was added in 1982 - twelve years after the Service listed the stickleback. The 1982 ESA amendment specifies that pre-1982 determinations be treated as "regulations proposing the designation of critical habitat." [[719]](#footnote-720)719 Unlike the ESA regulations for designations which state the Service "shall" designate critical habitats, the regulations for revisions state that the Service "may" revise designations. The court seized on this difference as evidence that Congress intended for revisions to be discretionary. [[720]](#footnote-721)720 Furthermore, "the Service has discretion in choosing a course of action with respect to such proposals, just as it does in deciding whether or not to propose a designation." [[721]](#footnote-722)721 To read the statute as creating a mandatory duty would render the statute's use of "may" "superfluous" [[722]](#footnote-723)722 and "the statute's separate treatment of revisions and designations" "meaningless." [[723]](#footnote-724)723 Finally, the court rejected the argument that **[\*780]** a mandatory duty arose when the Service did not make a final determination within a year after the 1982 enactment. "Agency delay does not transform a discretionary duty into a mandatory duty, especially where Congress provided a specific remedy for such a violation - a citizen suit to compel a decision." [[724]](#footnote-725)724 The Service's duty was discretionary and it chose to not designate critical habitat for the stickleback.

The court next rejected CBD's second challenge that the Finding was arbitrary and capricious. Before addressing the merits of the argument, the court held that CBD had standing under the Administrative Procedure Act (APA) to challenge the Finding. [[725]](#footnote-726)725 The court concluded that because the Service had a mandatory duty to issue its Finding by publishing one of four actions under the ESA [[726]](#footnote-727)726 then the action was not one "committed to agency discretion by law" and the APA's review provision applied. [[727]](#footnote-728)727

As for the merits of the challenge that the Service's decision was arbitrary and capricious, the court examined whether the "Service failed to articulate a rational connection between the fact that "critical habitat is a high priority' for the stickleback and its Finding that the proposed designation should not be made." [[728]](#footnote-729)728 To answer that question, the court looked at the agency's stated rationale [[729]](#footnote-730)729 that of the four actions it could take under the ESA, it chose not to designate critical habitat because it could not justify any of the other three actions. [[730]](#footnote-731)730 First, the Service stated it could not designate critical habitat because the 1980 proposal was not based on the best scientific data available [[731]](#footnote-732)731 and new scientific evidence and economic analysis would be required. Second, the Service stated that it could not defer its decision to redo the economic analysis and update the scientific information because it already had a backlog of duties that were mandatory designations of critical habitat, which demanded a higher priority. [[732]](#footnote-733)732 Third, the Service stated that it could not withdraw the designation because it could not make the requisite finding of insufficient **[\*781]** evidence based on stale data, and collecting new data would compromise the backlog of mandatory duties. [[733]](#footnote-734)733 The Service concluded that the proposed designation should not be made and that this decision would not affect existing protections for the stickleback. [[734]](#footnote-735)734

The court rejected CBD's argument that this Finding frustrated the policy mandate of the ESA. The court held that the Finding had "no effect" on the agency's duty to consult the Service and avoid jeopardizing the stickleback, [[735]](#footnote-736)735 it did not eliminate the ESA's prohibition against the taking of stickleback, [[736]](#footnote-737)736 and, moreover, the court would not question "Congress's decision to allow the Service discretion regarding designation of critical habitat for species listed as endangered prior to 1982." [[737]](#footnote-738)737 The court also rejected CBD's argument that the Service may only refuse to designate critical habitat if "the benefits of such exclusion outweigh the benefits of specifying such an area." [[738]](#footnote-739)738 The court indicated that this provision only provides a "basis for determinations" [[739]](#footnote-740)739 and is a standard that only applies to mandatory designations. The determination at hand was a discretionary determination and, therefore, this section "simply [did] not apply." [[740]](#footnote-741)740 Based on this analysis the court concluded that the Service "considered the relevant factors and articulated a rational connection between the facts found and the choice made." [[741]](#footnote-742)741

CBD's third challenge to the Finding was that the Service did not provide adequate opportunity for notice and comment as required by the ESA and therefore the action should have been set aside under the APA. [[742]](#footnote-743)742 The court rejected this argument stating that, although the ESA specifically requires notice and comment under two circumstances involving critical habitat revisions, [[743]](#footnote-744)743 it does not expressly require notice and comment for a finding that a revision should not be made. [[744]](#footnote-745)744 The court therefore inferred that "Congress did not intend to require notice." [[745]](#footnote-746)745

Having found that the Service had the discretion to not designate the critical habitat, that the Service exercised that discretion properly, and that notice and comment were not required, the court concluded that neither the APA nor ESA required it to set aside the Finding.

**[\*782]** Next, the court rejected CBD's claim that the Service must ensure that an agency's action will not violate federal or state law before it can issue an ITS. Before addressing the merits, the court determined that CBD had standing and that CBD's claim was ripe. The APA right to judicial review [[746]](#footnote-747)746 applies universally except when the statute specifically precludes it or the agency action is discretionary. In this case, the court determined CBD had standing because the ESA did not preclude judicial review and because the Service allegedly had a mandatory duty. The court determined the claim was ripe because the issuance of an ITS would cause "hardship" to CBD by creating a legal right to take the stickleback, immediate judicial review of CBD's claim would not interfere with further administrative action, and further factual development would not assist resolving the issue. [[747]](#footnote-748)747

On the merits, the Court denied the claim that before issuing an ITS the Service must ensure compliance with other federal and state laws. [[748]](#footnote-749)748 Service regulations define "incidental take" as a "taking[] that results from, but is not the purpose of, carrying out an otherwise lawful activity." [[749]](#footnote-750)749 "Otherwise lawful activity" is defined as "those actions that meet all State and Federal legal requirements." [[750]](#footnote-751)750 However, the court rejected the argument that "legal requirements" meant compliance with all state and federal law. The ESA "says nothing about issuing a biological opinion or ITS only after ensuring a planned action's compliance with all state and federal laws." [[751]](#footnote-752)751 Furthermore, to require such would "impose an enormous burden on the Service." [[752]](#footnote-753)752 The Court deferred to the Service's "reasonable interpretation" of "legal requirements" as meaning that "an ITS does not relieve the action agency or applicant of its responsibility to comply with other … legal requirements." [[753]](#footnote-754)753 Therefore, the court determined that the Service was not required to ensure compliance with other laws prior to issuing an ITS.

Lastly, applying an abuse of discretion standard, the court affirmed the district court's decision to strike fifteen exhibits offered by CBD that were not in the administrative record. When reviewing an agency decision the focus should be on the "administrative record" [[754]](#footnote-755)754 and parties may not use "post-decision information as a new rationalization either for sustaining or attacking the Agency's decision." [[755]](#footnote-756)755 However, the court recognized four **[\*783]** exceptions to this rule, two of which CBD asserted: extra record materials may be allowed "(1) if necessary to determine whether the agency has considered all relevant factors and has explained its decision, [or] … (3) when supplementing the record is necessary to explain technical terms or complex subject matter." [[756]](#footnote-757)756 The court rejected CBD's reasoning that these exhibits were necessary as a "persuasive force" to explain "take" under state law and to show that the Service failed to consider a relevant factor. "Post-decision information "may not be advanced as a new rationalization … for attacking an agency's decision.'" [[757]](#footnote-758)757 Therefore, the court concluded that the district court did not abuse its discretion in striking these exhibits.

In conclusion, the Ninth Circuit affirmed the district court's ruling that the Service's decision to not designate critical habitat for the stickleback was not arbitrary and capricious, the Service was not required to ensure compliance with federal and state laws prior to issuing an ITS, and the district court did not abuse its discretion for striking exhibits that were outside the administrative record. The district court's grant of summary judgment to the Service and CEMEX was affirmed.

7. Western Watersheds v. Matejko, 468 F.3d 1099 (9th Cir. 2006).

Defendants U.S. Forest Service (USFS) and Bureau of Land Management (BLM), as well as individual agency officials, together with intervenor-defendant State of Idaho appealed a district court's finding in favor of plaintiffs Western Watersheds Project and Committee for Idaho's High Desert (collectively, Western Watersheds) that BLM's failure to initiate consultation regarding its decision to not regulate certain privately-held vested rights-of-way diverting irrigation water across public lands violated the requirement under the Endangered Species Act (ESA) [[758]](#footnote-759)758 to consult with the Secretary of the Interior or the Secretary of Commerce if there is "any action authorized, funded, or carried out by" [[759]](#footnote-760)759 a federal agency. The Ninth Circuit Court of Appeals reversed and denied Western Watersheds's petition for rehearing, holding that while affirmative actions trigger ESA's consultation requirement because BLM took no such action there was no duty to consult.

Western Watersheds filed suit in 2001 against BLM, BLM's regional officials, and USFS seeking declaratory and injunctive relief regarding BLM's acquiescence in hundreds of river and stream irrigation "diversions" (e.g., dams and pipes) by parties holding vested rights-of-way to divert water on public lands in central Idaho. These water rights vested prior to passage of the Federal Land Policy and Management Act (FLPMA). [[760]](#footnote-761)760 BLM issued a **[\*784]** policy statement in 1983 [[761]](#footnote-762)761 and regulations in 1986 [[762]](#footnote-763)762 recognizing the existence of the pre-FLPMA water rights and providing for BLM approval or action only if there was a "substantial deviation in location or authorized use" [[763]](#footnote-764)763 of the right-of-way. The parties did not dispute that the diversions could jeopardize threatened fish species. Western Watersheds's primary claims against USFS settled. The district court found that BLM had discretionary involvement in the diversions because it could have chosen to regulate them and held that BLM "acted" either by 1) continuing to follow the regulations that vested the water rights, or 2) by not exercising its discretion to regulate the diversions. [[764]](#footnote-765)764 The district court reasoned that BLM had not performed a mandatory duty and could therefore be compelled to perform under the Administrative Procedure Act (APA). [[765]](#footnote-766)765 The district court entered a permanent injunction against BLM, requiring the agency to initiate consultation. [[766]](#footnote-767)766

The Ninth Circuit reviews a district court's decision to issue a permanent injunction for abuse of discretion, [[767]](#footnote-768)767 but reviews the district court's rulings of law de novo. The Administrative Procedure Act (APA) [[768]](#footnote-769)768 governs Ninth Circuit review of agency decisions under the ESA. [[769]](#footnote-770)769 The sole count of Western Watersheds's amended complaint on appeal called for the parties to litigate six representative diversions, focusing on the question of whether ESA section 7(a)(2) required BLM to initiate consultation.

The Ninth Circuit reasoned that the appeal depended on whether a failure to exercise discretion is an "agency action" [[770]](#footnote-771)770 subject to ESA's consultation requirement. The court began by examining the plain language of the ESA. The court noted that section 7(a)(2) indicates that "agency action" [[771]](#footnote-772)771 is "any action authorized, funded or carried out by such agency." [[772]](#footnote-773)772 **[\*785]** The court reasoned that a failure to act is out of place among section 7(a)(2)'s affirmative acts of authorizing, funding and carrying-out, noting that other parts of the ESA refer explicitly to agencies' failure to act. [[773]](#footnote-774)773 The court next considered the ESA regulations.

Both sides sought to support their arguments using ESA regulations defining "action." [[774]](#footnote-775)774 Western Watersheds argued that a regulation's reference to "all activities or programs of any kind" [[775]](#footnote-776)775 as actions encompassed an agency's failure to act, while BLM emphasized the affirmative nature of that regulation's examples of actions. [[776]](#footnote-777)776

The Ninth Circuit next considered its prior interpretations of ESA section 7(a)(2). While providing that "agency action" should be broadly construed, [[777]](#footnote-778)777 the court noted that a recent Ninth Circuit case, Defenders of Wildlife v. EPA, [[778]](#footnote-779)778 required consultation under the ESA only in cases of affirmative agency action. The court noted the Defenders of Wildlife opinion's consistency with earlier Ninth Circuit cases [[779]](#footnote-780)779 and, using Ninth Circuit precedent, [[780]](#footnote-781)780 distinguished "affirmative" actions from BLM's failure to act. The court concluded that BLM did not act affirmatively to establish the diversions and was "not an entity responsible for [the challenged] decisionmaking." [[781]](#footnote-782)781

Next, the Ninth Circuit addressed Western Watersheds's argument that BLM's ongoing decision not to exercise its regulatory discretion constituted "affirmative action" under 50 C.F.R. § 402.03. [[782]](#footnote-783)782 The court noted that **[\*786]** "where the challenged action comes within the agency's decisionmaking authority and remains so, it falls within section 7(a)(2)'s scope," [[783]](#footnote-784)783 but reasoned that there was no ongoing action where BLM had acted and then later either relinquished or lost its authority to act. The court reasoned that BLM's position was analogous to two cases where agencies had no ongoing decisionmaking authority: Environmental Protection Information Center v. Simpson Timber Company [[784]](#footnote-785)784 and Sierra Club v. Babbitt. [[785]](#footnote-786)785 The court distinguished Washington Toxics Coalition v. Environmental Protection Agency, [[786]](#footnote-787)786 Pacific Rivers Council v. Thomas [[787]](#footnote-788)787 and Turtle Island Restoration Network v. National Marine Fisheries Services [[788]](#footnote-789)788 as cases where agencies retained continuing decisionmaking authority.

The Ninth Circuit next addressed the issue of whether BLM had any discretion to regulate the diversions to protect endangered species. The court provided that while BLM had other regulatory authority [[789]](#footnote-790)789 it had no power to regulate to protect endangered species; BLM's 1983 instructions, and 1983 and 2005 [[790]](#footnote-791)790 regulations only allowed BLM's discretionary regulation of the diversions if there was a "substantial deviation in location or authorized use of pre-FLPMA rights." [[791]](#footnote-792)791 The court concluded that BLM's authority over the diversions did not amount to continuing "discretionary involvement or control" [[792]](#footnote-793)792 under ESA regulations. [[793]](#footnote-794)793

Finally, the Ninth Circuit addressed the district court's finding that BLM could be compelled to initiate consultation under the APA due to its failure to act. The court noted that the current action was not to "compel agency action" [[794]](#footnote-795)794 and provided that the Western Watersheds's suit could not be a **[\*787]** programmatic challenge to BLM's regulation of pre-FLPMA water rights. [[795]](#footnote-796)795 The court also indicated that Western Watersheds's suit was not valid as a "failure to regulate" claim because such claims must be grounded in a clear duty for an agency to take a particular action. [[796]](#footnote-797)796

In conclusion, the Ninth Circuit reversed the district court's permanent injunction against BLM and denied Western Watersheds's petition for rehearing, finding that BLM had no duty under the ESA to consult regarding the test-case diversions.

8. Northwest Ecosystem Alliance v. United States Fish and Wildlife Service, 475 F.3d 1136 (9th Cir. 2007).

Plaintiffs Northwest Ecosystem Alliance, Center for Biological Diversity, and Tahoma Audubon Society (collectively Alliance) appealed a district court's grant of summary judgment in favor of the U.S. Fish and Wildlife Service (Service). The Alliance had sought declaratory and injunctive relief against the Service and its officials, arguing that the Service's decision to not issue an emergency rule to list the Washington population of the western gray squirrel as an endangered or threatened species was arbitrary and capricious. On appeal, the Ninth Circuit held that the Service's construction of the term "distinct population segment" is entitled to deference under Chevron U.S.A., Inc. v. Natural Resources Defense Council, [[797]](#footnote-798)797 and that the Service's decision to not list the Washington population of the western gray squirrel was not arbitrary and capricious.

Under the Endangered Species Act (ESA), [[798]](#footnote-799)798 the Service is required to identify and list species that are "endangered" [[799]](#footnote-800)799 or "threatened," [[800]](#footnote-801)800 either on its own initiative or through a petition process. Anyone can petition the Service to add or remove a species from the list, and, after receiving a petition, the Service must "promptly determine whether the petition is supported by "substantial scientific or commercial information.'" [[801]](#footnote-802)801 If the petition is so supported, then the Service must make a determination as to the status of the species within twelve months. [[802]](#footnote-803)802

A "species," under the ESA, includes "any subspecies of fish or wildlife or plants, and any distinct populations segment of any species of vertebrate fish or wildlife which interbreeds when mature." [[803]](#footnote-804)803 While the statute, **[\*788]** however, does not define "distinct population segment," the Service and the National Marine Fisheries Service (NMFS) jointly follow a policy on distinct populations (DPS Policy) that looks at two factors in determining whether a distinct population segment exists. [[804]](#footnote-805)804 First, the Service and NMFS look at "discreteness," which "is satisfied if a population is "separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors' or if a population's boundaries are marked by international borders." [[805]](#footnote-806)805 The second factor the Service and NMFS look at is "significance," which is analyzed under the following nonexclusive factors:

(1) whether the population persists in a unique or unusual ecological setting; (2) whether the loss of the population would cause a "significant gap' in the taxon's range; (3) whether the population is the only surviving natural occurrence of the taxon; and (4) whether the population's characteristics are "markedly' different from the rest of the taxon. [[806]](#footnote-807)806

At issue in this case was the Washington gray squirrel, which exists in three geographically isolated populations: the Puget Trough, the North Cascades, and the South Cascades populations. The Alliance petitioned the Service, requesting an emergency rule to list the Washington populations of the western gray squirrel as endangered or threatened. The Service initially published findings that the petition showed substantial information that a distinct population segment (DPS) of the western gray squirrel might exist in Washington, and the Service's staff scientists recommended listing the population as an endangered DPS. The Service, however, denied the petition, determining that under the DPS Policy the Washington population was not significant to the taxon to which it belongs. Thereafter, the Alliance filed a complaint in federal court, seeking declaratory and injunctive relief, but the district court granted summary judgment for the Service.

On appeal, the Ninth Circuit addressed two issues: "(1) whether the Service's construction of the term "distinct population segment' is entitled to Chevron deference, and if so, whether the Service's construction is reasonable; and (2) whether the Service's denial of the petition was arbitrary and capricious." [[807]](#footnote-808)807 The Ninth Circuit addressed each issue in turn, reviewing the grant of summary judgment de novo. [[808]](#footnote-809)808 The court noted that it could only set aside the agency's action if it were found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." [[809]](#footnote-810)809

As for the first issue, the Ninth Circuit determined that the elements of the DPS Policy that applied to deny the Alliance's petition - namely the policy that a DPS must be significant to its taxon - was entitled to Chevron **[\*789]** deference if reasonable. [[810]](#footnote-811)810 The Alliance sought to invalidate that element of the DPS Policy, not on its face, but as applied against Alliance. The court nonetheless considered the general validity of that aspect of the DPS policy.

The Alliance argued the DPS Policy was not entitled to Chevron deference because the DPS Policy does not have the "force of law" [[811]](#footnote-812)811 but is an "informal policy statement that lies "beyond the Chevron pale.'" [[812]](#footnote-813)812 The court found that the Alliance had presented no evidence that the DPS Policy had ever been treated as anything other than legally binding. Additionally, the court noted that one of the primary reasons for not treating policies generally as having the force of law - that many policies are not subject to notice and comment requirements - was lacking in this case, because the ESA expressly requires public notice and comment for the creation and modification of a DPS Policy. Therefore, the DPS Policy is entitled to Chevron deference if it is a reasonable interpretation of the statute.

The Ninth Circuit next looked at whether the DPS Policy was in fact reasonable, and the court found that it was. The Alliance made several arguments on appeal, all of which failed. The Alliance first argued that it was unreasonable for the DPS Policy to require a population to be both discrete and significant when the statute only requires that a population be distinct. The court rejected this argument, finding that "distinct" was a flexible enough term to encompass both significant and discrete. The Alliance next argued that the DPS Policy "conflates the statutory definitions of "species' and "endangered species,' reducing the latter to mere surplusage." [[813]](#footnote-814)813 The Ninth Circuit, however, rejected this argument as well, finding that, while the terms were the same, they were used for different functions, so that, when applied, the terms were not identical. Third, the Alliance argued that the DPS Policy "reflects an impermissibly narrow understanding of the ESA's purpose and focuses excessively on conserving genetic resources." [[814]](#footnote-815)814 The Ninth Circuit rejected this argument, too, finding that the DPS Policy did not focus on genetic conservation to the expense of the ESA's other goals. Fourth, the Alliance argued that the Service "improperly considered congressional policy preferences expressed after the enactment of the ESA." [[815]](#footnote-816)815 The court rejected this argument, saying that "so long as the agency action is not manifestly contrary to the statute, it is not improper for the agency to consider the views of the elected branches in interpreting an ambiguous statutory term." [[816]](#footnote-817)816 Lastly, the Alliance argued that the Service **[\*790]** had applied the DPS Policy inconsistently, but the court found that all of the examples offered by the Alliance were inapposite because they occurred before the DPS Policy was issued or were not sufficiently similar to the instant case to show a pattern of inconsistent application. Thus, having rejected all of the Alliance's arguments, the court concluded that the DPS Policy was a reasonable interpretation of the ESA under Chevron.

The Ninth Circuit next addressed whether the Service's denial of the Alliance's petition was arbitrary and capricious. The court explained that the only real issue before it was whether the Service had "considered the relevant factors and articulated a rational connection between the facts found and the choices made." [[817]](#footnote-818)817 The court proceeded to look at whether the Service had adequately considered the Washington gray squirrel population's "significance." Although the DPS Policy outlines four factors for "significance," the Service had only considered the first, second and fourth factors, and therefore the court reviewed the Service's determination as to each of the three factors.

As for the first factor, "ecological setting," the Alliance challenged the Service's finding that the North Cascades and Puget Trough were not unique ecological settings. The Alliance argued that the lack of oak trees in the former and the heavy concentration of oak trees in the latter made the two areas unique. The court found that the Service had adequately explained that such differences do not make an ecological setting unique, although the court noted that "the Service probably could have explained its reasoning in more detail." [[818]](#footnote-819)818

As for the second factor, "significant gap in range," the Alliance challenged the Service's finding that a significant gap in the range of the taxon would not result from a hypothetical loss of the entire Washington population. The court began its discussion by noting that "the Service's discussion of this factor is not a paragon of clarity." [[819]](#footnote-820)819 The court, however, went through the Service's findings, explaining that the Service found the Washington gray squirrel lacked biologically distinctive traits. And, because the species was not biologically distinct, its hypothetical loss would not cause a gap in the range of the taxon.

As for the third factor, "marked genetic differences," the Alliance and the Service disputed whether the genetic differences between the Washington gray squirrel and other squirrels rose to the level of "markedly." The Service, relying on a peer-reviewed study, determined that the differences were not "markedly" genetically different, while the Alliance argued that the scientific evidence showed the differences were marked and the Service was simply interpreting the data incorrectly. The court explained that "interpretation of complex genetic data falls within the domain of the Service's scientific discretion, to which [it] must defer so long as the Service has articulated a rational basis for its conclusion." [[820]](#footnote-821)820 The court then stated **[\*791]** that the Service had in fact articulated such a rational basis, such that the Service's conclusions were not arbitrary and capricious.

Thus, the Ninth Circuit upheld the district court's grant of summary judgment for the Service, determining that the DPS Policy is entitled to Chevron deference as it constitutes a reasonable interpretation of the ESA. Thus, the Service's action denying the Alliance's petition to list the Washington gray squirrel as threatened or endangered, having been based on the DPS Policy, was not arbitrary and capricious.

9. Oregon Natural Resources Council v. Allen, 476 F.3d 1031 (9th Cir. 2007).

Oregon Natural Resources and several other conservation groups (collectively ONRC) appealed a district court's grant of summary judgment in favor of the U.S. Fish and Wildlife Service (FWS), which found that an Incidental Take Statement (Statement) remained valid despite FWS's partial withdrawal of the accompanying Biological Opinion (BiOp). Under the Endangered Species Act (ESA), [[821]](#footnote-822)821 FWS first issues a BiOp and then a Statement, which is derivative of the BiOp. [[822]](#footnote-823)822 FWS in this case withdrew a portion of its BiOp but did not change the corresponding Statement, and ONRC filed suit alleging that the Statement was consequently invalid. The district court granted summary judgment for FWS, but the Ninth Circuit reversed, holding that FWS's Statement was arbitrary and capricious. The Ninth Circuit remanded the case with instructions that the court enter summary judgment in favor of ONRC.

The ESA commands all federal agencies to insure that their actions are not likely to "jeopardize the continued existence of any endangered species … or result in the destruction or adverse modification of habitat of such species." [[823]](#footnote-824)823 The ESA also forbids any "taking" of a listed species, [[824]](#footnote-825)824 but an agency can apply for an incidental take permit from FWS or National Marine Fisheries Service (NMFS). [[825]](#footnote-826)825 Thus, "when the FWS [or NMFS] concludes that an action will not jeopardize the existence of a listed species or adversely modify its habitat, but the project is likely to result in incidental takings of listed species, the FWS [or NMFS] must provide a written statement with the BiOp that authorizes such takings." [[826]](#footnote-827)826 The agency must **[\*792]** report back to FWS or NMFS "in order to monitor the impacts of incidental take," [[827]](#footnote-828)827 and the agency must reinitiate consultation if "the amount or extent of incidental taking is exceeded." [[828]](#footnote-829)828

In 2001, the Bureau of Land Management and the Forest Service (Agencies) wanted to conduct seventy-five timber sales, which involved more than sixty-four thousand acres of federally-managed land in the Pacific Northwest. As required by the ESA, the Agencies consulted with FWS, and FWS issued a BiOp. [[829]](#footnote-830)829 The BiOp found that the sales would severely impact habitat for the northern spotted owl, [[830]](#footnote-831)830 a species listed as threatened under the ESA, [[831]](#footnote-832)831 but the BiOp nevertheless concluded that "the anticipated harvest "[was] not likely to jeopardize the existence of the spotted owl … and [was] not likely to destroy or adversely modify designated habitat for the spotted owl.'" [[832]](#footnote-833)832 FWS then issued a Statement that did not provide a numerical cap on takes. Rather, it provided a "surrogate" [[833]](#footnote-834)833 limitation that allowed for the taking of "all spotted owls associated with the removal and downgrading of 22,227 acres of suitable spotted owl habitat." [[834]](#footnote-835)834

In 2003, ONRC initiated suit, challenging the validity of the BiOp and the Statement. The district court granted summary judgment for FWS, and ONRC appealed. While the appeal was pending, the Ninth Circuit decided Gifford Pinchot Task Force v. United States Fish and Wildlife Service (Gifford). [[835]](#footnote-836)835 In Gifford, the Ninth Circuit held that "the definition of "destruction or adverse modification' of critical habitat employed by the FWS in assessing jeopardy to the northern spotted owl violated the ESA." The court in Gifford found that this definition ""set[] the bar too high' by finding adverse modification only where proposed actions impacted "both the survival and recovery of a listed species.'" [[836]](#footnote-837)836 FWS acknowledged that **[\*793]** Gifford invalidated a portion of its BiOp, and FWS "voluntarily reinitiated consultation on the land designated as northern spotted owl critical habitat, represented by FWS to be 5,383 acres." [[837]](#footnote-838)837

On review, ONRC made two arguments as to why the court should reverse the district court's grant of summary judgment: 1) that FWS's voluntary reinitiation of consultation on BiOp's timber sales rendered the Statement invalid, and 2) that the Statement was invalid because it did not adequately quantify how many owls could be "taken" or explain why no number was given. The Ninth Circuit reviewed the district court's grant of summary judgment de novo, [[838]](#footnote-839)838 noting that the BiOp and the Statement were final agency actions subject to the arbitrary and capricious standard of review. [[839]](#footnote-840)839

As for the first argument, the Ninth Circuit agreed with ONRC that FWS's reinitiating consultation "materially changed the scope of the BiOp, necessitating a new Incidental Take Statement." [[840]](#footnote-841)840 The Ninth Circuit explained that an incidental take must in fact be incidental, and "without understanding the scope and purpose of the action itself - information contained in the BiOp - there is no way of knowing whether the take being authorized is properly "incidental.'" [[841]](#footnote-842)841 The court said that FWS could not allow the Statement in this case to stand alone before completion of the new BiOp that would use the proper definition of "destruction or adverse modification of critical habitat." The court explained that allowing this would be tantamount to pre-approval of a no jeopardy finding in the new BiOp.

The Ninth Circuit next addressed ONRC's second argument that the Statement was invalid for not containing a numerical cap or explanation, and the court agreed that the Statement must contain a "numerical cap" on takes or at least explain why no such number is given. [[842]](#footnote-843)842 FWS had provided that takes were limited to "all spotted owls associated with the removal and downgrading of 22,227 acres of suitable spotted owl habitat." [[843]](#footnote-844)843 FWS argued that quantifying the take in terms of lost habitat acreage was sufficient, but the court disagreed, saying this quantification was not the type contemplated by Congress. The Ninth Circuit also noted that the BiOp offered no explanation for why FWS was unable to give a numerical cap, and the court stressed that without some explanation for why a numerical cap could not be provided, the Statement could not rely on a surrogate cap and was thus invalid.

The Ninth Circuit went on to provide a third reason, not raised by ONRC, for why the Statement was invalid. The Ninth Circuit held that the **[\*794]** Statement was invalid because it "could not adequately trigger reinitiation of consultation." [[844]](#footnote-845)844 FWS argued that the court should defer to its decision to use habitat measurements as a limitation on take, but the court disagreed. The court explained that, while FWS may use ecological conditions as a surrogate for a numerical cap, "the surrogate must not be so general that the applicant or the action agency cannot gauge its level of compliance." [[845]](#footnote-846)845 The Ninth Circuit explained that the authorized level of takes in this case, which was "all spotted owls associated with the removal and downgrading of 22,227 acres of suitable spotted owl habitat," [[846]](#footnote-847)846 could not trigger reinitation of consultation until the project was complete. By using the parameters of the project, i.e. habitat measurements, to limit the level of take, the FWS made "the permissible level of take [] coextensive with the project's own scope." [[847]](#footnote-848)847 The Ninth Circuit held that because reinitiation of consultation could not occur while the project was still underway, the Statement in effect allowed for the taking of all spotted owls associated with the project. Therefore, the court would not defer to FWS's decision to use the project's parameters as a surrogate for a numerical cap on takes.

The Ninth Circuit thus reversed the district court's grant of summary judgment in favor of FWS. The Ninth Circuit held that FWS's Statement was arbitrary and capricious, and remanded with instructions that the district court enter summary judgment in favor of ONRC.

B. Alaska National Interest and Land Conservation Act

1. Hale v. Norton, 476 F.3d 694 (9th Cir. 2007), supra Part I.B.

2. Fitzgerald Living Trust v. United States, 460 F.3d 1259 (9th Cir. 2006), infra Part II.E.

C. Indian Law

1. Gros Ventre Tribe v. United States, 469 F.3d 801 (9th Cir. 2006).

Plaintiffs Gros Ventre Tribe, the Fort Belknap Indian Community Council, and the Assiniboine Tribe (the Tribes) appealed the District Court of Montana's grant of summary judgment for lack of jurisdiction [[848]](#footnote-849)848 to defendants the Bureau of Land Management (BLM), the Indian Health Service, the Bureau of Indian Affairs and the United States (the **[\*795]** Government) on claims that by approving and planning expansion of two cyanide heap-leach gold mines upriver from the Tribes' reservation the Government breached general and specific trust obligations to safeguard tribal trust resources, mainly water rights. Rejecting the Tribes' liability theory combining principles of general trust law with a challenge to agency inaction under the Administrative Procedure Act [[849]](#footnote-850)849 (APA), the Ninth Circuit affirmed. The Ninth Circuit held that the government had no trust duty to regulate non-tribal resources for the Tribes' benefit, and that after dividing the trial into a remedy and a liability phase the district court did not abuse its discretion by granting summary judgment to the Government at the finish of the liability phase.

Residing on the Fort Belknap Indian Reservation (the Reservation), the Assiniboine and Gros Ventre Tribes are both signatories to the Treaty of Fort Laramie [[850]](#footnote-851)850 and the 1855 Treaty with the Blackfeet. [[851]](#footnote-852)851 In 1888, Congress reduced the territory of the Gros Ventre and set aside for the Tribes' use the Fort Belknap Indian Reservation, [[852]](#footnote-853)852 which included the Little Rocky Mountains, an area historically important to the Tribes and harboring gold deposits to which the Tribes relinquished their rights in the "Grinnell Agreement." [[853]](#footnote-854)853 Between 1979 and 1991, the Montana Department of State Lands authorized open pit mining using cyanide heap-leach technology near the Reservation's southern boundary. In 1981, BLM joined in this authorization. These agencies approved the expansion of mining in a 1996 Environmental Impact Statement (EIS) and Record of Decision (ROD), despite discovering a widespread acid rock drainage problem. The Tribes successfully appealed the 1996 EIS and ROD to the Interior Board of Land **[\*796]** Appeals [[854]](#footnote-855)854 (IBLA), but while the appeal was pending in 1998, the mining companies declared bankruptcy and abandoned the expansion plans. BLM issued another ROD in 1998, rescinding the 1996 ROD and requiring reclamation of mining disturbances. Because the new ROD depended on the 1996 EIS, IBLA vacated it on the same grounds that it cited to revoke the 1996 ROD. In response, the State of Montana and BLM consulted with the Tribes, issuing a Final Supplemental Environmental Impact Statement (SEIS) in 2001 and a new ROD in 2002.

In 2000, the Tribes sued in equity, alleging that by permitting, approving, and failing to reclaim the mines the government breached its common law tribal trust obligations, because operation of the mines was still degrading tribal water resources. The Tribes asked the district court to: 1) declare that the government breached its fiduciary duty to safeguard tribal trust resources, 2) find that the government's failure to obey statutory mandates including the National Environmental Policy Act [[855]](#footnote-856)855 (NEPA) violated the Federal Land Policy and Management Act [[856]](#footnote-857)856 (FLPMA) by allowing an undue and unnecessary degradation, 3) compel the government to satisfy its trust obligations by issuing a writ of mandamus, and 4) enjoin the government from continued destruction of tribal trust resources. In 2004, the district court awarded summary judgment to the government and subsequently denied the Tribes' motion to amend judgment. The district court had concluded that the Tribes had no common law trust rights enforceable under the APA, that the Tribes did not have standing to challenge the 1996 ROD even though it was a final agency action because it had been superseded, and that because the mines had closed, challenges to BLM's approval of the mines' operation were moot.

The Ninth Circuit reviews a district court's grant of summary judgment de novo [[857]](#footnote-858)857 and reviews its litigation management decisions for an abuse of discretion. [[858]](#footnote-859)858 The Ninth Circuit first addressed the parties' argument involving whether a "final agency action" [[859]](#footnote-860)859 is required to trigger the waiver of sovereign immunity under the APA [[860]](#footnote-861)860 for actions in equity against the government. While recognizing a conflict in Ninth Circuit case law concerning this point, [[861]](#footnote-862)861 the court declined to address that issue and instead affirmed the district court on its alternative holding that the Tribes had no **[\*797]** substantive right to enforce the trust obligation independently of some other source of law.

Next, the Ninth Circuit addressed the Tribes' argument that "simple common law trust claims based on clearly identified and ongoing injuries" renders the APA's "final agency action" requirement inapplicable. [[862]](#footnote-863)862 The court held that the Tribes could not bring a claim for breach of trust under common law that is completely distinct from any right provided in a statute. Further, while "there is a "distinctive obligation of trust incumbent upon the Government in its dealings with [Indian tribes],'" [[863]](#footnote-864)863 that by itself does not require the government to do more than obey generally applicable regulations and statutes. [[864]](#footnote-865)864 The court noted that in Vigil v. Andrus, [[865]](#footnote-866)865 the Tenth Circuit held that the government's tribal fiduciary duties did not extend to providing free lunches to all Indian schoolchildren. [[866]](#footnote-867)866 Also, in Shoshone-Bannock Tribes v. Reno, [[867]](#footnote-868)867 the D.C. Circuit held that a treaty provision that entitled tribes to hunt on unoccupied federal land as long as game remained [[868]](#footnote-869)868 did not require the government to litigate claims to water rights on behalf of the tribes. [[869]](#footnote-870)869

The Ninth Circuit distinguished cases holding that the government had to obey a particular fiduciary obligation on the ground that in this case the Tribes sought to enforce a duty not specified in any statute or treaty to regulate non-tribal lands for the good of the Tribes. [[870]](#footnote-871)870 The court discussed United States v. Mitchell, [[871]](#footnote-872)871 in which the Supreme Court held that the United States did not have a fiduciary duty to manage timber on allotted lands for the good of the Indian-allottees. Although there was statutory language providing that the United States held the land in trust, that language was ambiguous, and the legislative history did not suggest that Congress intended **[\*798]** the government to have a fiduciary duty. [[872]](#footnote-873)872 Citing precedent as mandatory authority, the Ninth Circuit rebutted the Tribes' assertion that Mitchell only applies to suits seeking money damages and that the government still has a general fiduciary duty to them in actions relating to Indian tribes that cannot be met through facial compliance with regulatory and statutory mandates. [[873]](#footnote-874)873

Next, the Ninth Circuit addressed the Tribes' argument that the Treaty with the Blackfeet, the Treaty of Fort Laramie, and the Grinnell Agreement impose a fiduciary duty on the government to manage water resources not located on the Reservation. The court noted that none of these agreements indicated that the government agreed unambiguously to manage water resources off the Reservation for the Tribes' benefit. [[874]](#footnote-875)874 Instead, the agreements only required the government to protect the Tribes from depredation on the Reservation, a duty only measurable in reference to universally applicable regulations and statutes. The court distinguished Mitchell on the grounds that in that case the tribes sought to enforce the United States' fiduciary duty to manage resources on tribal land, whereas here the Tribes sought to impose a duty on the government "to regulate third-party use of non-Indian resources for the benefit of the Tribes." [[875]](#footnote-876)875 Providing that it knew of no authority that imposed a fiduciary duty in management of non-tribal resources, the court cited Marceau v. Blackfeet Housing Authority [[876]](#footnote-877)876 as indicating that the government has a comprehensive fiduciary responsibility only when it has ""taken full control of a tribally-owned resource and managed it to the exclusion of the tribe.'" [[877]](#footnote-878)877 The court indicated that when it read the Grinnell Agreement, the Treaty of Fort Laramie, and the Treaty with the Blackfeet, it discerned a fiduciary duty on the government to protect the Tribes only from depredations on tribal land, **[\*799]** which did not extend to the management of non-tribal resources for tribal benefit, including the mitigation of the nearby mine tailings.

The Ninth Circuit next addressed the Tribes' claim under § 706(1) of the APA [[878]](#footnote-879)878 that the government violated FLPMA by failing to stop the undue and unnecessary degradation of public lands. [[879]](#footnote-880)879 The court noted that in Norton v. Southern Utah Wilderness Alliance, [[880]](#footnote-881)880 the Supreme Court provided that "[a failure to act claim] under [5 U.S.C.] § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take," [[881]](#footnote-882)881 therefore courts lack the power to "enter general orders compelling compliance with broad statutory mandates." [[882]](#footnote-883)882 The Ninth Circuit affirmed the district court's decision to dismiss the Tribes' FLPMA claim for lack of jurisdiction, providing that even if the government had a common law fiduciary duty springing from its obligations under FLPMA, there was no basis on which to assert that these obligations mandate the government to perform certain nondiscretionary acts.

Next, the Ninth Circuit addressed the district court's finding that it lacked jurisdiction to hear the Tribes' claims relying on the APA to allege violations of NEPA and the NHPA. The court provided that there is no private right of action under either NEPA or NHPA, so the Tribes had to assert claims under the APA. [[883]](#footnote-884)883 The court noted that within the six-year statute of limitations, [[884]](#footnote-885)884 the only "final agency action" that the Tribe challenged was the vacated 1996 ROD. The Ninth Circuit upheld the district court's determination that it did not have jurisdiction over the Tribes' claims under the APA because the Tribes could not allege injury arising from the 1996 ROD because it had since been vacated. [[885]](#footnote-886)885

Finally, the Ninth Circuit addressed the Tribes' claim that the district court abused its discretion by granting summary judgment to the government at the close of the liability phase of the trial, before the Tribes could present evidence regarding feasible remedies. The court noted that while the district court's original order provided "although damages have **[\*800]** been bifurcated from liability, the lack of an effective remedy for any wrongs committed on the Tribes renders the exercise of judicial power superfluous, and the case moot," [[886]](#footnote-887)886 it explained its reasoning in a subsequent order. The district court's subsequent order provided that it reconsidered its prior ruling on jurisdiction sua sponte and that it lacked jurisdiction to hear the Tribes' claims because the Tribes could not challenge any actions outside the six year statute of limitations, and could not challenge the 1996 EIS and ROD, which had been vacated. The Ninth Circuit provided that because a district court is obligated at every stage of a trial to examine its jurisdiction, [[887]](#footnote-888)887 and because the parties had briefed the issues thoroughly when the district court first considered the government's motion to dismiss, [[888]](#footnote-889)888 by reconsidering its jurisdiction at the close of the trial's liability phase the Montana District Court did not abuse its discretion.

In conclusion, the Ninth Circuit affirmed the district court's grant of summary judgment to the government, rejecting the Tribes' argument that the government had a fiduciary duty to regulate off-reservation mining sites on behalf of the Tribes.

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

The Pit River Tribe, the Native Coalition for Medicine Lake Highlands Defense, and the Mount Shasta Bioregional Ecology Center (collectively Pit River) sued the U.S. Forest Service, Bureau of Land Management and Department of Interior (collectively Agencies) alleging that the procedures followed by the Agencies in extending certain leases in the Medicine Lake Highlands and in approving the construction of a geothermal plant by Calpine Corporation [[889]](#footnote-890)889 violated the National Environmental Policy Act (NEPA), [[890]](#footnote-891)890 the National Historical Preservation Act (NHPA), [[891]](#footnote-892)891 the National Forest Management Act (NFMA), [[892]](#footnote-893)892 the Administrative Procedure Act (APA), [[893]](#footnote-894)893 and the Agencies' fiduciary obligations to Native American tribes. The district court granted summary judgment in favor of the Agencies [[894]](#footnote-895)894 and Pit River appealed. The Ninth Circuit reversed, concluding that the Agencies did not take a "hard look" at the environmental consequences of the 1998 lease extensions and failed to adequately consider the no-action alternative.

The lawsuit stemmed from Calpine's efforts to build a geothermal power plant at Fourmile Hill near Medicine Lake, California. The Secretary **[\*801]** of Interior designated the Medicine Lake Highlands as the Glass Mountain Known Geothermal Resource Area (Resource Area) pursuant to the Geothermal Steam Act of 1970, [[895]](#footnote-896)895 an act that allows the federal government to "issue leases for the development and utilization of geothermal steam" on federal land in national forests. [[896]](#footnote-897)896 In 1973, the Department of Interior (DOI) issued an environmental impact statement (EIS) for the nationwide application of the Geothermal Steam Act. With the exception of three sites, the 1973 EIS did not discuss implications for specific locations, but provided a tiered environmental review with specific details to be "identified, evaluated, and described in the environmental analysis record prepared for each lease area prior to any leasing action." [[897]](#footnote-898)897 The EIS also admitted that issuing geothermal leases "may constitute [] major Federal action significantly affecting the quality of the human environment" that would require subsequent EISs. [[898]](#footnote-899)898 In addition, the DOI stated in the EIS that further environmental evaluation would be made prior to construction of power plants and related facilities and added that if there are "significant potentially adverse environmental impacts not previously considered, an additional environmental statement may be necessary."

In 1981, the Bureau of Land Management (the Bureau) and Forest Service released an environmental assessment (EA) to decide whether to allow geothermal leasing and "casual use" exploration of the Resource Area. It did not discuss cultural or tribal impacts of the proposed leasing, but mentioned that one of the directives for the Land Management Plan was to develop resources when "it is compatible with other uses" and with "special stipulations applied to sensitive areas." [[899]](#footnote-900)899 The 1981 EA also acknowledged that while "a decision to lease carries with it the right to develop a discovered resource, subject to the limitations of the lease," there were also environmental safeguards throughout the process and that EAs and EISs would be required at certain stages. [[900]](#footnote-901)900

In 1984, the Bureau and Forest Service jointly issued a Supplemental EA tiered to the 1973 EIS that for the first time considered the potential effects of leasing activity on cultural, recreational, and spiritual aspects of certain features in the Medicine Lake area. It stated that the area remained culturally significant to modern-day Native Americans and that the American Indian Religious Freedom Act of 1979 "requires ongoing consultation with Native American organizations and individuals" in order to protect sites important to cultural traditions. [[901]](#footnote-902)901 The EA acknowledged that any surface-disturbing activity "will disturb and/or destroy the patterning of surface and subsurface artifacts … [and] have the potential to adversely affect the **[\*802]** spiritual significance of natural features important to Native American groups." [[902]](#footnote-903)902 It also acknowledged the potential historical significance of the area, but concluded that "nomination and/or acceptance [to the National Register of Historic Places] is, however, no obstacle to a site's removal by scientific excavation." [[903]](#footnote-904)903 To address these potential impacts the Bureau included a table of mitigating measures. The EA still required that the lessee prepare "an operating plan for subsequent activities in exploration, development and operation of the lease" that would include additional environmental analysis and approval. [[904]](#footnote-905)904

After mailing the 1984 EA to approximately 100 individuals and organizations and receiving only four letters in response, the Bureau adopted a Record of Decision (ROD) in 1985 in which it leased 41,500 acres in the Resource Area. It concluded that geothermal development would have no significant adverse impacts on the area and so an EIS was not necessary.

In June 1988, the Bureau issued the leases at issue in this case to Calpine's predecessor in interest, Freeport-McMoran Resource Partners Limited Partnership, without any additional environmental or cultural impacts analysis. The ten-year leases gave an exclusive right to develop geothermal resources on the land subject to stipulations regarding existing regulations, water use and restrictions in particular affected areas. The lease also included a restriction forbidding surface-disturbing activities during the nesting season of the Goshawk. The Bureau did not complete an EA or EIS or consult interested tribes prior to issuing these leases.

Calpine did little during the initial lease term. In 1995, it submitted a plan of operation for a proposed Fourmile Hill Geothermal Exploration Project (Exploration Plan) in the same general location of the later-proposed power plant. The agencies drafted and distributed an EA in December 1995 and, after receiving little public comment, issued a Finding of No Significant Impact (FONSI) and approved the project in April 1996.

Calpine submitted a plan in September 1995 for a geothermal power plant: the Fourmile Hill Geothermal Development Project (Fourmile Hill Plant). The agencies began preparing an EIS in June 1996 and, after commissioning an ethnographic report to identify cultural resources for the local tribes in the area, they issued a draft EIS for the Fourmile Hill Plant. The public and the Pit River Tribe highly criticized the draft EIS.

In May 1998, the Bureau extended Calpine's leases for five more years without any further environmental review. In September 1998, the agencies issued a final EIS for the Fourmile Hill Plant (1998 EIS) that included different configurations for the facilities. Although the EIS mentioned a "no-action" alternative, it was rejected because "it would not meet the purpose and need for the proposed action," namely "to develop the geothermal resource on Calpine's Federal geothermal leases." [[905]](#footnote-906)905

**[\*803]** In July 1999, the Keeper of the National Register of Historical Places issued a report determining that the Medicine Lake caldera was eligible for listing in the National Register and calling for studies of other sites in the area.

On May 31, 2000, the agencies issued a ROD approving the Fourmile Hill Plan, stating that the leases they had issued to Calpine were a "vested property interest" that superseded an Executive Order on Indian Sacred Rights. [[906]](#footnote-907)906 However, as part of the mitigation measures, the Bureau placed a moratorium on further development in the Resource Area for a minimum of five years "until an analysis of actual impacts of geothermal development can be completed by the authorizing agencies." This resulted in the Bureau suspending operation and production in multiple leases in the Resource Area.

Pit River appealed the ROD to the Interior Board of Land Appeals and the Regional Forester for the Pacific Southwest Region. Both appeals were denied and the Bureau unilaterally lifted the moratorium stating that "the energy situation in the country, and particularly in the West, had changed." [[907]](#footnote-908)907

In May 2002, the Bureau extended Calpine's lease for another forty years with no additional environmental analysis. In June, Pit River filed suit in the Eastern District of California and on February 17, 2004, the district court entered summary judgment for the Agencies on all claims. [[908]](#footnote-909)908

The Ninth Circuit reviewed the district court's decision de novo, applying the same standards as the district court. [[909]](#footnote-910)909 The court reviewed the agencies' decision under the arbitrary and capricious standard of the Administrative Procedure Act (APA). [[910]](#footnote-911)910

Prior to addressing the merits of the case, the court answered two gateway questions: whether Pit River had Article III standing to raise the claims, and whether 2005 amendments to the Geothermal Steam Act affected the justiciability of Pit River's claims. [[911]](#footnote-912)911

In regards to the first question, the court initially identified the three constitutional standing requirements: injury in fact, causation and redressability. [[912]](#footnote-913)912 The court found that Pit River adequately demonstrated injury in fact, citing Pit River's testimony that the tribe had used the lands in question for cultural and religious ceremonies for "countless generations" and a 1996 ethnographic report commissioned by the agencies that stated that these areas were "traditional cultural properties of … the Pit River Nation." [[913]](#footnote-914)913

**[\*804]** Having determined that there was injury in fact, the court stated that the causation and redressability requirements were relaxed. [[914]](#footnote-915)914 Causation was not challenged, but the agencies asserted that the 1998 lease extensions were no longer justiciable because they were replaced by the 2002 lease extensions, thereby making them not redressable. The court concluded that it could still provide effective relief for Pit River either by invalidating the leases as of 1998, thereby invalidating the 2002 extensions, or by enjoining any surface-disturbing activity until the agencies complied with NEPA. Finally, the court rejected the agencies' argument that the preparation of the 1998 EIS foreclosed relief on Pit River's claims.

In regards to the 2005 amendments to the Geothermal Steam Act, the court determined that they did not render Pit River's claims moot by eliminating the Bureau's discretion to deny lease extensions. Prior to 2005, the Act stated that the agencies "may" extend any geothermal lease for successive five-year periods. [[915]](#footnote-916)915 The 2005 amended Act states that "the Secretary shall extend the primary term of a geothermal lease for 5 years" if the lessee satisfies work commitment requirements of the lease and makes annual payments. [[916]](#footnote-917)916 In other words, if these two conditions were met, then "the statute eliminated the Bureau's discretion in extending geothermal leases … ." [[917]](#footnote-918)917 Since NEPA's EIS requirement only applies to discretionary federal decisions, [[918]](#footnote-919)918 Pit River's relief would be foreclosed if the 2005 amendment was retroactive.

The court then set out to determine whether the amendments applied retroactively. It adopted the test from Landgraf v. USI Film Products: [[919]](#footnote-920)919 if Congress expressly states that an amendment applies retroactively then the matter is settled. However, absent an express statement, the court must determine "whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transaction already completed." [[920]](#footnote-921)920 If so, the court presumes against applying the statute retroactively.

Applying Landgraf, the Ninth Circuit determined there was no such express statement. Furthermore, applied retroactively, the amendment would impose new duties on Calpine, including new minimum work and payment requirements. The court concluded the amendments did not apply retroactively, and therefore, the case was not moot.

The court then turned to the merits of the case, addressing the claims under NEPA and the NHPA. Because the statute of limitations had run on the 1988 leasing decision, Pit River claimed that the agencies violated NEPA, **[\*805]** the NHPA and their fiduciary trust obligations to the Pit River Tribe by failing to complete an EIS prior to extending the lease in 1998. The agency argued that its environmental analysis under the 1973 EIS, 1981 EA, and 1984 EA were adequate to cover the 1998 extension or, in the alternative, that the court could not provide adequate relief because the preparation of the post-lease extension 1998 EIS that analyzed effects of the power plant already provided relief.

The first question the court addressed was whether under NEPA the agencies had taken the requisite "hard look" at the environmental consequences of its decision. [[921]](#footnote-922)921 This "hard look" had to include consideration of a "no action" alternative prior to the agency selling leases that constitute "an irreversible and irretrievable commitment of federal forest land … that could have a significant impact on the environment." [[922]](#footnote-923)922 If the agencies did not conduct such an analysis, it foreclosed the possibility of considering a reasonable range of alternatives. [[923]](#footnote-924)923 The court cited Conner v. Burford, [[924]](#footnote-925)924 a case in which federal agencies sold ***oil*** and gas leases, some of which did not allow the government to later preclude surface-disturbing activities: [[925]](#footnote-926)925

After the lease is sold the government no longer has the ability to prohibit potentially significant inroads on the environment. By relinquishing the "no action" alternative without the preparation of an EIS, the government subverts NEPA's goal of insuring that federal agencies infuse in project planning a thorough consideration of environmental values… . [The "no action" alternative] analysis would serve no purpose if at the time the EIS is finally prepared, the option is no longer available. [[926]](#footnote-927)926

However, when the agency does not irretrievably commit resources, an EIS is not required. [[927]](#footnote-928)927

The question was then whether the Agencies irretrievably committed resources when they issued the leases and 1998 extensions or whether they reserved the right to preclude surface-disturbing activities entirely. The court determined that the 1998 lease extensions only reserved the Agencies' right to limit development "when not inconsistent with lease rights granted," and not the absolute right to deny exploitation of the resources. [[928]](#footnote-929)928 Although there were some absolute limitations on surface-disturbances in sections of the leases for certain periods of the year, that was not enough.

**[\*806]** The court supported its decision with the Agencies' own interpretations of the leases. According to a 1999 briefing paper, although the agencies were considering a no action alternative, DOI Solicitors advised that "denial of the Projects would be a taking of private property rights associated with the leases… . The decision makers would like to have the authority to deny the geothermal Projects, which may require compensation to the leaseholders for the taking." [[929]](#footnote-930)929 The Court determined that this language demonstrated that the agencies "did not have the authority to deny the projects." [[930]](#footnote-931)930 The court also examined the ROD for Fourmile Hill Plant and its analysis that, although the surface-disturbance activities would have adverse effects on sacred sites under Executive Order 13,007, it was not possible to deny the project without also denying Calpine's vested rights as a leaseholder.

The court then rejected the argument that the 1973 programmatic EIS adequately addressed the potential impact of leasing. Although the court held in 1978 that the 1973 EIS was adequate for "casual use" exploration, [[931]](#footnote-932)931 that case dealt with casual leases that did not constitute "irreversible and irretrievable commitments" of resources for development. [[932]](#footnote-933)932 In addition, the ruling was based on the assumption that the leasing program would not proceed without "fully considering [the] obligation to comply with the EIS requirements of NEPA." [[933]](#footnote-934)933

The court also found the 1981 and 1984 EAs insufficient because they dealt only with the issue of leases and casual use exploration and not actual geothermal development.

The court also rejected the argument that the 1998 lease extensions were just a continuation of the status quo that did not require a separate assessment. [[934]](#footnote-935)934 If it were not for the extension in 1998, Calpine would have lost its right to develop the leased property and its ability to move ahead with the construction of the Fourmile Hill Plant. Therefore, agencies were required to conduct an EIS prior to extending the 1998 leases.

Next the court addressed Calpine's argument that the 1998 EIS for the Fourmile Hill Plant "mooted" Pit River's claim because its preparation was the relief the plaintiff sought. The court reframed the issue as one of standing and, more specifically, redressability. The 1998 EIS did not provide the remedy Pit River sought because it was an ex post facto environmental review that could not include the no-action remedy necessary in the required review of a ""maximum range of options'" in an EIS. [[935]](#footnote-936)935 The NEPA procedures must be integrated into the decision-making process "as close as possible to the time the agency is developing or is presented with a proposal." [[936]](#footnote-937)936 The court cited two of its earlier decisions. In Save the Yaak Committee v. Block, **[\*807]** the court held that the Forest Service's completion of an EA two years after starting construction on a road was untimely and "seriously impeded the degree to which their planning and decisions could reflect environmental values." [[937]](#footnote-938)937 In Metcalf v. Daley the court held that the issuance of a FONSI for hunting of gray whales was insufficient because the EA was prepared after the government agencies had already entered into two agreements with the Makah Tribe. [[938]](#footnote-939)938 This was an "irreversible and irretrievable commitment of resources" prior to environmental review. [[939]](#footnote-940)939

The court in this case found even more reason, as compared to Metcalf and Save the Yaak, to hold that the later environmental review was insufficient. Not only was the EIS untimely, but it failed to address the issue of whether the land should be leased at all and only discussed configurations of the proposed power plant. The no action alternative was not considered because it was inconsistent with the purpose of the project, namely developing the geothermal resources. This did not fulfill the hard look requirement of NEPA.

Therefore, the Ninth Circuit held that "the 1998 lease extensions - and the entire Fourmile Hill Plant approval process for development of the invalid lease right - violated NEPA." [[940]](#footnote-941)940

The Pit River Tribe also claimed that the agencies violated the NHPA by not identifying traditional cultural properties prior to the extension of the leases. The district court found that the 1998 EIS provided all the relief sought or, in the alternative, [[941]](#footnote-942)941 that the NHPA did not apply to the lease extension because the extension simply maintained the status quo. The court rejected these decisions. "NHPA is similar to NEPA except that it requires consideration of [the action's effects on] historical sites, rather than the environment." [[942]](#footnote-943)942 If the agency determines an action may affect the historic values of an Indian tribe, the agency must give the tribe an opportunity to participate [[943]](#footnote-944)943 early in the process. [[944]](#footnote-945)944 The court held that, similar to the claims under NEPA, the lease extensions were a federal undertaking requiring review and that an ex post facto review could not cure the earlier violation because it did not address the no action alternative. Therefore, the court held that the agencies violated the NHPA.

Lastly, the court held that the agencies violated their fiduciary duty to the Pit River Tribe. It cited two earlier decisions in which it held that the federal government owes a fiduciary duty to the tribes [[945]](#footnote-946)945 and that this duty includes ensuring compliance with regulations and statutes not specifically **[\*808]** aimed at protecting the tribes. [[946]](#footnote-947)946 Because the court decided that the agencies violated NEPA and the NHPA, it concluded that the agencies also violated their minimum fiduciary duty to the tribe. However, the court did not reach the question of "whether the fiduciary obligations of federal agencies to Indian nations might require more." [[947]](#footnote-948)947

In conclusion, the Ninth Circuit held that the agencies violated NEPA, the NHPA, and their fiduciary duty to the Pit River tribe for failing to conduct an EIS prior to the 1998 lease extensions. Hence, the court ordered that the five year extensions and the subsequent forty-year extensions be undone and the rest of the project approval process be set aside. The court did not reach Pit River's claims for actions subsequent to the 1998 extensions including the 2000 agency decisions, the NFMA claims, and the APA claim related to the rescission of the development moratorium. The court reversed the district court's summary judgment in favor of the agencies and directed the district court to enter summary judgment in favor of Pit River.

3. Pakootas v. Teck Cominco Metals, 452 F.3d 1066 (9th Cir. 2006), supra Part I.A.

D. Magnusun-Stevens Fisheries Conservation Act

1. Oregon Trollers Association v. Gutierrez, 452 F.3d 1104 (9th Cir. 2006).

Fishermen, fishermen's organizations, and fishing-related businesses (Oregon Trollers) sued the National Marine Fisheries Association (NMFS) and other government entities challenging 2005 management measures that substantially limited commercial and recreational salmon fishing in the Klamath Management Zone - an area located off the coasts of California and Oregon. The plaintiffs alleged that these measures violated substantive and procedural requirements of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson Act). [[948]](#footnote-949)948 The Ninth Circuit reversed the district court's ruling that the plaintiffs' claim was time-barred due to a failure to file within the thirty-day statutory period of the agency action, but upheld the district court's ruling that NMFS did not violate the Magnuson Act.

In 2005, NMFS projected that critically low numbers of naturally spawning Klamath Chinook salmon (Oncorhynchus tshawytscha) would survive the fishing harvest in the Klamath Management Zone and return to spawn in the upper reaches of the Klamath River. Because the Pacific **[\*809]** Fisheries Management Council (PFMC) [[949]](#footnote-950)949 projected a wild spawner escapement [[950]](#footnote-951)950 below the 35,000 escapement floor established in a 1989 amendment to the Pacific Coast Salmon Management Plan (Pacific Plan), [[951]](#footnote-952)951 NMFS adopted fisheries management measures for 2005 that dramatically curtailed commercial, and to a lesser extent recreational fishing in the Klamath Management Zone. [[952]](#footnote-953)952 The agency did not take public comment before adopting the measures, and instead cited the need to implement restrictions before the beginning of the fishing season as a "good cause" exception to the Administrative Procedure Act (APA) requirement of public comment. [[953]](#footnote-954)953 NMFS published the 2005 management measures in the Federal Register on May 4, 2005 and within thirty days the plaintiffs filed suit in federal district court to challenge the 1989 escapement floor and the 2005 action.

The district court ruled that the plaintiffs' claims challenging the 1989 escapement floor were time-barred because they were not filed within thirty days of the agency adoption of the 1989 regulation as required by the Magnuson Act. [[954]](#footnote-955)954 In addition, the district court ruled that, even if those claims were not time-barred, the plaintiffs failed to show on the merits that NMFS violated any procedural or substantive requirements of the Magnuson Act. [[955]](#footnote-956)955

The Ninth Circuit reviewed the district court's statute of limitations determination de novo. [[956]](#footnote-957)956 It reversed the district court, ruling that the plaintiffs' claims were not time-barred because they challenged the 2005 **[\*810]** management measures, which constituted an agency "action" within the thirty days of the date when that action was published in the Federal Register. [[957]](#footnote-958)957 The Magnuson Act had originally only allowed for judicial review of agency "regulation" and required challengers of regulations to file suit within thirty days of the rule's publication. [[958]](#footnote-959)958 However, a 1990 amendment extended allowed challenges to agency "actions" that are published in the Federal Register including those "that establish the date of closure to commercial and recreational fishing." [[959]](#footnote-960)959 Under the amendment, challenges to an action must similarly be filed within thirty days of the action's publication in the Federal Register. The fact that the plaintiffs' claims were rooted in the 35,000 spawner escapement goal of the 1989 regulation did not foreclose them from filing within the thirty days of the agency publishing the 2005 management measure. [[960]](#footnote-961)960

The court rejected all three of the defendants' arguments that the plaintiffs' claims were time-barred. First, the defendants claimed that the plaintiffs waived their argument that the statutory period was based on the 2005 agency action by not raising it in district court. The Ninth Circuit responded by pointing out that the plaintiffs did, in fact, raise it during oral argument on summary judgment. Second, the court determined that the holding in Norbird Fisheries, Inc. v. National Marine Fisheries Service [[961]](#footnote-962)961 did not time bar the plaintiffs' challenge to the 1989 regulation because Norbird only applied to cases where only a regulation was at issue. Here, the challenge was not just based on a regulation, but also on a later agency action in which a timely challenge was filed. Third, the court ruled that the plaintiffs' challenge was not to a regulation, but to an action and therefore within the thirty-day period. Indeed, the court reasoned, there was no better example of an agency action than the 2005 management measures. These measures fit the definition of actions in section 1855(f)(2), [[962]](#footnote-963)962 and they were implemented, [[963]](#footnote-964)963 finalized, **[\*811]** and published [[964]](#footnote-965)964 according to the process set out in the Pacific Plan's regulations for actions.

The Ninth Circuit then turned to the merits of the case reviewing NMFS construction of the Magnuson Act under the two-step test of Chevron, U.S.A. Inc. v. Natural Res. Def. Council. [[965]](#footnote-966)965 That test requires the court to determine if a statute is ambiguous and, if so, to then determine if the agency's interpretation of that statute is reasonable. [[966]](#footnote-967)966 The Magnuson Act adopts the APA standard that in order to set aside an agency's regulations, a court must find they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." [[967]](#footnote-968)967 To meet this standard the agency must consider "relevant data" and "articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made.'" [[968]](#footnote-969)968

The plaintiffs made six claims, three of which attacked the 1989 regulation establishing a 35,000 natural spawner escapement floor and three of which attacked the 2005 management measures. As to the 1989 regulation, the plaintiffs claimed 1) that the regulations counting natural spawning salmon as a "stock of fish" separate from hatchery spawning salmon were not consistent with the Magnuson Act's definition of "stock of fish," [[969]](#footnote-970)969 2) that an escapement goal that counts only natural spawners was not consistent with the "national standard" requiring measures be "based on the best scientific information available," [[970]](#footnote-971)970 and 3) that these regulations were inconsistent with the "national standard" that, "to the extent practicable, an individual stock of fish shall be managed as a unit." [[971]](#footnote-972)971

First, the Ninth Circuit determined that there was nothing in the Magnuson Act that prevented NMFS from including only naturally spawning salmon - that is, salmon that spawn outside of hatcheries - in establishing the escapement goals and thereby treating them as an individual "stock of fish … for the purposes of conservation and management," separate from salmon that spawn in hatcheries. [[972]](#footnote-973)972 The court determined that such a **[\*812]** classification is consistent with the dictionary definition of the term "category," [[973]](#footnote-974)973 previous NMFS regulations [[974]](#footnote-975)974 and scientific policy papers. [[975]](#footnote-976)975 Furthermore, the phrase "capable of management as a unit" in the Magnuson Act does not preclude NMFS from making a distinction between hatchery and natural spawners. [[976]](#footnote-977)976 NMFS has a great deal of flexibility to set that management unit as long as it is consistent with "the focus of the FMP's [Fishery Management Plan's] objectives." [[977]](#footnote-978)977 Finally, although the Magnuson Act did not expressly distinguish between natural and hatchery spawners, a closely related statute, the Trinity River Basin Fish and Wildlife Management Reauthorization Act of 1997, did. [[978]](#footnote-979)978 This act's "clear intent to distinguish between natural and hatchery fish sheds light on Congress' wishes for the Magnuson Act." [[979]](#footnote-980)979

The court also rejected the argument that a district court's interpretation of "species" under the Endangered Species Act to include hatchery as well as naturally spawning salmon should apply to "stock of fish" under the Magnuson Act [[980]](#footnote-981)980 because neither the Endangered Species Act (ESA) nor the district court's opinion suggested that "species" and "stock" have the same definition.

Second, the Ninth Circuit determined that NMFS had a "rational basis" [[981]](#footnote-982)981 for including only natural spawners in the 1989 regulation and that there was no evidence that such a determination was not based on "the best scientific information available." [[982]](#footnote-983)982 On a strictly statutory interpretation basis, the Magnuson Act regulates fisheries, [[983]](#footnote-984)983 and fisheries include "stocks." [[984]](#footnote-985)984 The court ruled that since naturally spawning salmon may **[\*813]** constitute an individual stock, NMFS could set an escapement goal unique to natural spawners. Though the plaintiffs did not attack the scientific basis for the escapement goal, the court went on to state that NMFS had compiled sufficient scientific information in establishing that escapement goal and there was no evidence in the record indicating that the NMFS data was "outdated and flawed." Furthermore, the reviewing court is "highly deferential" in matters of scientific and technical expertise. [[985]](#footnote-986)985

Third, the court ruled that NMFS regulations managing the entire Klamath Management Zone, which extends from Humbug Mountain, Oregon to Horse Mountain, California, were consistent with the Magnuson Act's national standard requiring that "to the extent practicable, an individual stock of fish shall be managed as a unit throughout its range." [[986]](#footnote-987)986 Because Klamath Chinook salmon migrate throughout Oregon and California, NMFS regulations managing the entire Klamath Management Zone are necessary to ensure the 35,000 natural spawner escapement goal.

As to the 2005 management measures, the plaintiffs claimed 1) the management measures did not adequately take into account the "importance of fishery resources to fishing communities" as required by a Magnuson Act national standard; [[987]](#footnote-988)987 2) the measures were inconsistent with the Magnuson Act's national standard that required NMFS "to the extent practicable" to "promote the safety of human life at sea;" [[988]](#footnote-989)988 and 3) NMFS improperly invoked the "good cause" exception under the APA thereby allowing NMFS to skip the public comment period that is typically required before publishing the management measures. [[989]](#footnote-990)989

First, the Ninth Circuit held that NMFS adequately addressed the national standard [[990]](#footnote-991)990 requiring it "to take into account the importance of fishery resources to fishing communities" in its 2004 Environmental Assessment (EA) that supported the 2004 management measures and in a 2005 supplement that supported the contested management measures. The court indicated that the plaintiffs did not provide data to support their claim that the 2004 EA and 2005 supplement were inadequate. "So long as the agency appropriately updates its analysis under [the] National Standard … , there is no reason why it must start from scratch every year." [[991]](#footnote-992)991

Second, the court rejected the plaintiffs' claim that NMFS did not "to the extent practicable" "promote human safety" when they shortened the fishing season thereby forcing fishermen to fish regardless of weather and other dangers. NMFS addressed safety concerns in an April 2005 **[\*814]** memorandum when it stated that "the proposed action is expected to be neutral with respect to health and safety." The court concluded that it was within the agency's discretion to determine that this neutrality qualified as a promotion of safety "to the extent practicable."

Third, the Ninth Circuit upheld the agency's use of the "good cause" exception in adopting the 2005 management measures. Under the APA, NMFS is normally required to open a public comment period prior to adopting annual management measures. [[992]](#footnote-993)992 However, that requirement is excused when the agency incorporates a finding that "notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." [[993]](#footnote-994)993 NMFS cited the time pressure to issue management rules before the fishing season began as grounds for this good cause exception. Management decisions could not be made any earlier because of the lack of data and they could not be made any later because allowing the fishing season to open without new regulations could undermine the annual escapement goals. The court distinguished the facts of the present case from those in Natural Res. Def. Council v. Evans, [[994]](#footnote-995)994 in which it determined NMFS had not adequately justified its decision to not open a public comment period prior to publishing management measures implementing a groundfish FMP under the "good cause" exception. [[995]](#footnote-996)995 In Evans, the court stated that the agency had failed to "demonstrate … some exigency apart from generic complexity of data collection and time constraints." [[996]](#footnote-997)996 However, in this case the Ninth Circuit agreed with the district court that the statement of good cause issued by NMFS was adequate given its considerable length and the specific reasons cited for the decision. Furthermore, NMFS could continue to invoke this good cause exception in the future as long as it gives "season-specific reasons for why the good cause exception is needed." [[997]](#footnote-998)997

In conclusion, the Ninth Circuit reversed the district court and ruled that plaintiffs' claims were not time-barred because the thirty-day limitation period did not start until the "action" of NMFS publishing the 2005 management measures. On the merits, however, it upheld the district court's rejection of each of the plaintiffs' challenges to the 1989 regulation and the 2005 management measures.

**[\*815]**

E. Federal Lands Policy Management Act

1. Fitzgerald Living Trust v. United States, 460 F.3d 1259 (9th Cir. 2006).

The Fitzgeralds, who own property in Arizona that is completely surrounded by the Sitgreaves National Forest, filed suit under the Quiet Title Act [[998]](#footnote-999)998 and the Administrative Procedure Act (APA), [[999]](#footnote-1000)999 alleging they held preexisting access rights not subject to the Federal Land Policy Management Act's (FLPMA) [[1000]](#footnote-1001)1000 permitting process. The Fitzgeralds further asserted that the FLPMA easement across federal lands, proposed by the United States Forest Service (USFS), which was revocable and required annual payments, was arbitrary and capricious. The district court granted summary judgment in favor of the government, and the Fitzgeralds appealed to the Ninth Circuit. The Ninth Circuit affirmed.

The Fitzgeralds bought the twenty-eight acre property in 1983 for use as a residence and as a base for grazing operations in the surrounding national forest. The tract, known as the "O'Haco Cabins Ranch," was originally granted to another landowner in 1920 under the Homestead Act. [[1001]](#footnote-1002)1001 That transfer granted the land "with appurtenances thereof." [[1002]](#footnote-1003)1002 When the Fitzgeralds bought the property, USFS restricted motorized access to the land to the primary route, named Forest Development Road 56B (FDR 56B). In 1986, USFS informed the Fitzgeralds that since the road was no longer in public use, and agency policy was to have all uses permited, to continue use of the road, they had to apply for a FLPMA "special use permit." The Fitzgeralds refused to accept the permit, maintaining their access rights were not subject to permitting. After the Fitzgeralds also rejected a FLPMA "private road easement," offered under FLPMA, the USFS closed FDR 56B to all motorized traffic and the Chief of the Forest Service upheld the closure decision.

The Fitzgeralds filed an initial lawsuit in 1996 challenging the USFS road closure decision and seeking to quiet title in a common law easement over FDR 56B. [[1003]](#footnote-1004)1003 That case was dismissed as moot when the easement proposed by USFS expired. In 2000, the Fitzgeralds filed a new application to use FDR 56B, and USFS in turn drafted a thirty-year "private road easement" with several conditions. Under the proposed easement, the Fitzgeralds were to pay fair market value of $ 114.31 per year and USFS reserved the right to suspend or revoke the easement. The Fitzgeralds **[\*816]** rejected USFS's proposal and filed suit in federal district court, alleging they were entitled to use FDR 56B under three easements: a common law easement by necessity, an implied easement under the Homestead Act, and an express easement under the 1920 patent grant. The Fitzgeralds also contended that USFS issuance of the FLPMA easement was arbitrary and capricious because it restricted their common law right of access, rights under the Alaska National Interest Lands Conservation Act (ANILCA), [[1004]](#footnote-1005)1004 and right to a permanent easement under the National Forest Roads and Trails Act (NFRTA). [[1005]](#footnote-1006)1005 The district court granted summary judgment for USFS, finding that the agency had ability under FLPMA and ANILCA to restrict a private landowner's access through national forest land. The court also found the FLPMA easement's terms reasonable and that USFS did not abuse its discretion by offering the FLPMA easement instead of a NFRTA easement.

The Ninth Circuit reviews de novo appeals from summary judgment. [[1006]](#footnote-1007)1006 The court determines the existence of genuine issues of material fact and decides whether the district court correctly applied appropriate substantive law, while viewing the evidence in the light most favorable to the nonmoving party. [[1007]](#footnote-1008)1007

The Ninth Circuit held that the Fitzgeralds' common law and implied access rights were, as the district court found, preempted by statute (FLPMA and ANILCA) and even if the Fitzgeralds possessed an express easement it was subject to USFS regulations. [[1008]](#footnote-1009)1008 USFS authority to regulate the use of FDR 56B, the court noted, persisted regardless of any common law easement held by the Fitzgeralds. However, the court reasoned, the reasonableness of the USFS regulations depended on whether the Fitzgeralds held a common law easement. The court relied on its holding in Skranak v. Castenada, where USFS was required by its own regulations [[1009]](#footnote-1010)1009 to address common law easement claims advanced in FLPMA permit applications. [[1010]](#footnote-1011)1010 The Ninth Circuit read Skranak to stand for the principle that "the existence of a preexisting easement … is relevant to [USFS's] issuance of a statutory easement under FLPMA," and under that rubric assessed the Fitzgeralds' three easement claims. [[1011]](#footnote-1012)1011

The Ninth Circuit first addressed the Fitzgeralds' claim of an implied easement under the Homestead Act's provision allowing settlers "to enter … **[\*817]** unappropriated public lands" to establish homesteads. [[1012]](#footnote-1013)1012 While acknowledging that the Homestead Act did indeed allow inholders to access their lands by passing over government lands, the Ninth Circuit concluded that such access did not amount to an implied easement. [[1013]](#footnote-1014)1013 The court noted that custom impelled Congress to recognize access to public lands by implied license, but recognition of customary use did not confer vested rights. [[1014]](#footnote-1015)1014 The court concluded the Homestead Act merely sanctioned customary use of public lands. The Ninth Circuit rejected as unsubstantiated the Fitzgeralds' argument that the implied license morphed into an easement in 1920 when the former landowner secured a patent to the land. Finally, the court pointed out that had the Homestead Act granted vested access rights across public lands, statutes like the 1897 Organic Act [[1015]](#footnote-1016)1015 and ANILCA would not need to provide for public access over federal land as they do.

The court next addressed the Fitzgeralds' claim of a common law easement by necessity over FDR 56B. The Fitzgeralds cited several cases to show that such a claim may be made against the United States, none of which the Ninth Circuit found persuasive because the cases did not reach the question, and were not binding on the issue. [[1016]](#footnote-1017)1016 Without deciding whether such an easement can be obtained against the United States, the Ninth Circuit held the Fitzgeralds failed to meet the common law elements of easement by necessity. [[1017]](#footnote-1018)1017 Further, such easements are extinguished when the necessity disappears. It follows, the court reasoned, that statutory rights of access established by the 1897 Organic Act, FLPMA, and ANILCA destroy any easement of necessity.

Lastly, the Ninth Circuit addressed the Fitzgeralds' claim of an express easement over FDR 56B based on the 1920 patent grant of the land "with appurtenances thereof." The Fitzgeralds argued this language explicitly granted as an "appurtenance" an easement through the national forest, because without the easement, the land would have no value. The Ninth Circuit looked to the Tenth Circuit's opinion in United States v. Jenks, which **[\*818]** rejected that very argument. [[1018]](#footnote-1019)1018 While the word "appurtenance" carries with it existing easements, it does not create new ones, [[1019]](#footnote-1020)1019 and generally, intent to grant easements must be manifest and specific. The Ninth Circuit held the language here lacked the requisite intent and specificity to convey an easement over the trail that later became FDR 56B.

Upon refusing in turn all three of the Fitzgeralds' easement claims, the Ninth Circuit held that the USFS regulations regarding fair market value and revocation were reasonable. The annual fee was reasonable because the Fitzgeralds did not have a preexisting easement over the road, and were therefore not paying a fee for something they already owned. The court noted that the Fitzgeralds had not challenged the calculation of the fee or the amount of the fee in determining that the fee was reasonable. The court also held that the condition in the USFS easement providing for potential suspension, revocation, or termination were reasonable. That condition, the court concluded, was consistent with USFS discretion under FLPMA to restrict the "duration … transfer or assignment, and termination" of a FLPMA easement. [[1020]](#footnote-1021)1020

Finally, the court quickly disposed of the Fitzgeralds' claim that USFS abused its discretion by not providing them with a NFRTA easement. NFRTA provides for free easements to applicants participating in the construction and maintenance of the national forest road system. [[1021]](#footnote-1022)1021 Because the Fitzgeralds were not using FDR 56B to assist USFS in managing the forest, the court held that USFS was within its discretion to refuse a NFRTA easement.

The Ninth Circuit held the FLPMA easement offered by USFS to the Fitzgeralds was reasonable given they held no preexisting statutory or common law easements over the road.

2. Klamath Siskiyou Wildlands Center v. Boody, 468 F.3d 549 (9th Cir. 2006), supra Part I.B.

F. Forests

1. Earth Island Institute v. Ruthenbeck, 459 F.3d 954 (9th Cir. 2006).

The United States Forest Service (USFS) appealed a district court decision in favor of Earth Island Institute, Sequoia Forestkeeper, Heartwood, Inc., Center for Biological Diversity, and the Sierra Club (collectively Earth Island), which enjoined five of the USFS's regulations on the ground that the regulations were contrary to the Forest Service **[\*819]** Decisionmaking and Appeals Reform Act (ARA). [[1022]](#footnote-1023)1022 Earth Island also cross-appealed and renewed its challenges against four regulations that the district court had found valid. The Ninth Circuit partially affirmed the district court and held that Earth Island had standing to challenge all nine regulations, but the Ninth Circuit partially reversed the district court on ripeness grounds, holding that only one of Earth Island's claims presented a ripe controversy. As for the one ripe challenge, the Ninth Circuit affirmed the district court's invalidation and injunction of the challenged regulation, holding that it was contrary to the ARA.

The nine regulations at issue concerned USFS's procedures for notice, comment, and appeal of proposed forest management actions. Prior to 1992, USFS provided a "post-decision administrative appeals process" [[1023]](#footnote-1024)1023 for certain agency decisions, but USFS proposed a regulation in 1992 that eliminated such appeals and created a categorical exclusion from notice, comment and appeal for certain projects. Specifically, the exclusion applied to a project if the USFS had completed an Environmental Assessment (EA) under the National Environmental Policy Act (NEPA) [[1024]](#footnote-1025)1024 and found that the project would not result in a significant environmental impact. The 1992 proposed regulation met considerable objection, and Congress responded by enacting the ARA. The ARA required USFS, among other things, to "establish a notice and comment process" [[1025]](#footnote-1026)1025 for certain projects and to "modify the procedure for appeals of decisions concerning such projects." [[1026]](#footnote-1027)1026 The USFS proposed regulations implementing the ARA but, when these continued to meet with protest, USFS reinstated the pre-1992 notice, comment, and appeals process as an interim measure until it could issue regulations implementing the ARA.

On June 4, 2003, USFS published a final rule (2003 Rule), which contained the nine regulations at issue and revised the notice, comment and appeals process for projects implementing management plans for National Forests. [[1027]](#footnote-1028)1027 Specifically, one of the regulations in the 2003 Rule (section 12(f)), provided that "decisions for actions that have been categorically excluded from documentation" [[1028]](#footnote-1029)1028 in an EA or Environmental Impact Statement (EIS) are not subject to appeal. After publishing the 2003 Rule, USFS created and published two new categories of projects - fire rehabilitation projects on less than 4,200 acres [[1029]](#footnote-1030)1029 and salvage timber sales of **[\*820]** 250 acres or less. [[1030]](#footnote-1031)1030 USFS excluded these new categories of projects from EA and EIS analysis, and thus also excluded decisions for these projects from appeal under section 12(f).

On September 8, 2003, USFS issued a decision memo, approving a timber sale and treatment of 238 acres in the Sequoia National Forest called the Burnt Ridge Project (the Project). The memo stated that the Project was categorically excluded from documentation in an EA or EIS, because the project was a salvage timber sale of 250 acres or less. The decision memo also stated that, as a categorical exclusion, section 12(f) applied, and the Project was not subject to appeal. Earth Island challenged the Project, the parties eventually settled, and USFS withdrew the Project.

On December 1, 2003 Earth Island filed suit against USFS, bringing facial challenges to nine regulations in the 2003 Rule and challenging the 2003 Rule as applied to the Project. The district court upheld four of the regulations in the 2003 Rule and invalidated five others, ordering a nationwide injunction to prevent their application. USFS appealed the invalidation and injunction of the five regulations, and Earth Island cross-appealed the court's decision to uphold the other four regulations.

The Ninth Circuit first addressed the district court's finding that Earth Island had standing to challenge the regulations. To establish standing, Earth Island relied on the affidavit of Jim Bensman, an employee and member of one of the plaintiff organizations. Bensman claimed that he had been using National Forests for over twenty-five years and specifically planned to return to certain forests in the near future. He also claimed personal, aesthetic and procedural injuries, stating that, "if an appeal option were available to him on projects that are categorically excluded from appeal, he would exercise that right of appeal." [[1031]](#footnote-1032)1031 Earth Island argued that it had standing, based on Bensman's affidavit, [[1032]](#footnote-1033)1032 because the regulations harmed both personal aesthetic interests as well as the procedural interest of participating in an appeal process. USFS, on the other hand, argued that Earth Island had not suffered a "cognizable injury in fact with respect to the challenged regulations, because the regulations [had] not yet been applied." [[1033]](#footnote-1034)1033 To establish standing, a plaintiff must suffer from an actual injury, caused by defendant's conduct, which a favorable decision can redress. [[1034]](#footnote-1035)1034 While **[\*821]** aesthetic interests may be injuries in fact, the plaintiff must actually be among the injured; [[1035]](#footnote-1036)1035 future intentions to return to an area do not establish an actual or imminent injury, "unless the [plaintiff] has specific plans to return to the area." [[1036]](#footnote-1037)1036 Procedural injuries can establish standing, [[1037]](#footnote-1038)1037 but injury must be within the "zone of interest" [[1038]](#footnote-1039)1038 that Congress intended a statute to protect.

The Ninth Circuit affirmed the district court's determination that Earth Island had standing to challenge USFS's regulations, explaining that Earth Island had suffered both aesthetic and procedural injuries. The court stated that "Bensman's preclusion from participation in the appeals process may yield diminished recreational enjoyment," [[1039]](#footnote-1040)1039 and the court held that Bensman's procedural injury, being unable to appeal the Project, was within the zone of interests that Congress intended to protect in enacting the ARA, a procedural statute. The court also concluded that the injuries were fairly traceable to the regulations and that invalidating the regulations would redress the injuries.

The Ninth Circuit next addressed the district court's finding that Earth Island's claims were ripe for review. USFS argued that the challenges to the regulations were not ripe for review because the regulations had not yet been applied. Earth Island countered that the claims were ripe for review regardless of whether USFS had yet applied them, because the regulations constituted final agency actions and presented purely legal questions.

Abbott Laboratories v. Gardner [[1040]](#footnote-1041)1040 established a two-fold test for determining whether a pre-enforcement challenge of a regulation is ripe, requiring the court "to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." [[1041]](#footnote-1042)1041 Abbott Laboratories also established a presumption favoring ripeness for challenges to regulations that constitute final agency actions and that present purely legal questions. [[1042]](#footnote-1043)1042 However, in Toilet Goods Association, Inc. v. Gardner, [[1043]](#footnote-1044)1043 the Court held that if the regulations' effects are speculative and the record is incomplete, the claim is not ripe. [[1044]](#footnote-1045)1044 The Court further explained the ripeness doctrine in National Park Hospitality Association v. Department, [[1045]](#footnote-1046)1045 stating that a claim is also not ripe if "further factual development would "significantly advance [the court's] ability to deal with the legal issues presented.'" [[1046]](#footnote-1047)1046

**[\*822]** The Ninth Circuit held that Earth Island had only established that its claim under section 12(f) was ripe. The court explained that, because USFS had not yet applied any of the other regulations to the Project or any other projects, Earth Island's challenges to those other regulations were speculative. Although the challenges concerned final agency actions and presented purely legal questions, the court held that further factual development of the record would help the court review the matter. The court also held that the fact Earth Island and USFS had settled the dispute over the Project did not affect the ripeness of Earth Island's subsequent facial challenge to section 12(f).

Having found that only Earth Island's challenge to section 12(f) was ripe for review, the Ninth Circuit next addressed the district court's invalidation of that section as contrary to the ARA. USFS argued that the ARA contains ambiguous language and the regulation was simply a reasonable interpretation of that language. Earth Island, on the other hand, argued that the ARA is unambiguous, and its plain language requires an administrative appeals process. Earth Island alternatively argued that section 12(f) was invalid as contrary to the legislative history of the ARA.

To determine whether section 12(f) was valid under the ARA, the Ninth Circuit looked to Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. (Chevron). [[1047]](#footnote-1048)1047 Under Chevron, a court must defer to an agency's regulation if it is a reasonable interpretation of an ambiguous statute. [[1048]](#footnote-1049)1048 The Ninth Circuit held that section 12(f) was invalid, because the ARA was unambiguous and section 12(f) was contrary to that statute's plain language. The court explained that the ARA states that USFS "shall" provide opportunities for notice, comment, and appeal, and therefore the language does not permit the exclusion contained in section 12(f). The court also noted that, even if the ARA were ambiguous, section 12(f) would still be invalid under Chevron as an unreasonable interpretation of the statute in light of the ARA's legislative history, which showed that Congress passed the ARA to ensure the continuance of the administrative appeals process, after an attempt to eliminate such appeals.

The Ninth Circuit further held that the district court's decision to apply the injunction nationwide was not an abuse of discretion, thereby affirming the district court's denial of USFS's motion to limit the geographic scope of the injunction. The Ninth Circuit explained that the Administrative Procedures Act [[1049]](#footnote-1050)1049 compels complete invalidation of a regulation that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." [[1050]](#footnote-1051)1050

**[\*823]** In sum, the Ninth Circuit affirmed the district court's finding that Earth Island had standing to challenge all nine regulations based on personal and procedural injuries. The Ninth Circuit partially remanded, however, on the issue of ripeness, holding that eight of Earth Island's nine claims challenging regulations were not ripe. The court affirmed that the ninth regulation was invalid because it was contrary to its governing statute and that a nationwide injunction was an appropriate remedy. The Ninth Circuit remanded with respect to the remaining regulations for the district court to vacate its judgment for lack of a ripe controversy.

2. Earth Island Institute. v. United States Forest Service, 442 F.3d 1147 (9th Cir. 2006), supra Part I.B.

3. WildWest Institute v. Bull, 472 F.3d 587 (9th Cir. 2006), supra Part I.B.

G. Water

1. Central Delta Water Agency v. Bureau of Reclamation, 452 F.3d 1021 (9th Cir. 2006).

State agencies and local farmers (Delta parties) sued the United States Bureau of Reclamation and several administrative officials (the Bureau) challenging the Bureau's plan to release reservoir water in order to comply with federal fish habitat restoration requirements. They claimed that the Bureau was violating the 1992 Central Valley Project Improvement Act (CVPIA) [[1051]](#footnote-1052)1051 by releasing water from the New Melones Unit Reservoir under the Central Valley Project (the Project) that would eventually result in downstream salinity levels that exceed the state Vernalis Salinity Standard (the Standard). The Ninth Circuit agreed with the district court's determination that there was no genuine issue of material fact as to whether the Bureau would comply with the Vernalis Salinity Standard in the foreseeable future. Therefore, it affirmed the district court's denial of the Delta parties' motion for summary judgment and its grant of the Bureau's motion for summary judgment.

The Project includes the Sacramento and San Joaquin Rivers, which meet at the Sacramento-San Joaquin Delta, mix together, and flow into San Francisco Bay. The Bureau, a division of the Department of Interior, operates the Project and distributes water resources for beneficial uses according to permits it holds from the California State Resource Board **[\*824]** (State Board). The Bureau must also comply with the CVPIA, which "demands that the Project implement a significant fish habitat protection program, but that it do so in accordance with the applicable state water use permits." [[1052]](#footnote-1053)1052 One state permit standard - the Vernalis Salinity Standard - requires the Bureau not to allow an electrical conductivity measurement exceeding 0.7-1.0 mmhos/cm depending on the time of year.

In 1997, the Bureau adopted an operation plan for releasing water from the New Melones Unit, a reservoir in the San Joaquin River system. This plan included water releases aimed at maintaining wildlife habitats but that were projected to result in violations of the Vernalis Salinity Standard ten percent of the time over seventy-one years. However, by deviating from the plan when necessary the Bureau had thus far avoided exceeding the Standard since 1994.

The Delta parties sued the Bureau arguing that it should not be allowed, pursuant to the CVPIA, to release water from the New Melones Unit [[1053]](#footnote-1054)1053 or purchase water to supplement the water dedicated to fish and wildlife [[1054]](#footnote-1055)1054 unless it dedicated sufficient water to ensure that it did not exceed the Vernalis Salinity Standard. The Delta parties argued that the plan for the New Melones Unit would decrease water flow during irrigation months to the point where the salinity level would damage crops irrigated downstream in the region of Vernalis.

The district court held that the Delta parties lacked standing because the Bureau had not violated the standard since 1994, but the Ninth Circuit reversed holding that the Bureau's projections created sufficient risk of harm to confer standing. [[1055]](#footnote-1056)1055 The district court then held on remand that the Delta parties could not show "within reasonable scientific certainty" that the Bureau would exceed the Standard and, therefore, it granted the Bureau's motion for summary judgment. [[1056]](#footnote-1057)1056

The Ninth Circuit reviewed the district court's decision de novo [[1057]](#footnote-1058)1057 and sought to ""determine, viewing the evidence in the light most favorable to … the nonmoving party, whether there [were] any genuine issues of material fact and whether the district court correctly applied the substantive law.'" [[1058]](#footnote-1059)1058 First, the Court rejected the Delta parties' argument that the Ninth Circuit's determination that they had standing in Central Delta I removed the Delta parties' obligation to show an actual violation of the CVPIA, stating "our decision on standing does not obviate the need to address the merits of the litigation." [[1059]](#footnote-1060)1059 Second, the Court concluded that the Bureau was not required **[\*825]** under the CVPIA to "dedicate and allocate a specific amount of water to meet the Vernalis Salinity Standard before it may do anything else." [[1060]](#footnote-1061)1060 The Delta parties had seized on the language of § 3406(b)(2) of the CVPIA. [[1061]](#footnote-1062)1061 That section directs the Secretary to manage 800,000 acre-feet of "Central Valley Project yield" and then defines that yield as "the delivery capability of the Central Valley Project during the 1928-1934 drought period after fishery, water quality, and other flow and operational requirements … have been met." [[1062]](#footnote-1063)1062 However, the Court determined that this was "merely a definition" [[1063]](#footnote-1064)1063 and that the clear language of the act "does not direct the Bureau to allocate a specific amount of water to pre-CVPIA purposes prior to exercising its discretion to achieve its other purposes." [[1064]](#footnote-1065)1064 The Bureau cannot violate the Vernalis Salinity Standard, but Congress left it up to the agency to determine "how to comply with those standards." [[1065]](#footnote-1066)1065 Furthermore, given that the Bureau had not violated that standard since 1994 the court noted that the Bureau's discretion "seemed to be working just fine." [[1066]](#footnote-1067)1066

The court then held that the Delta parties had "failed to raise a genuine issue of material fact as to whether the Bureau [would] comply with the standard in the foreseeable future." [[1067]](#footnote-1068)1067 According to the court, there were two major flaws in the Delta parties' reliance on the model in the Bureau's plan for the New Melones Unit: the model was based on hypothetical water conditions that would "undoubtedly and frequently change," [[1068]](#footnote-1069)1068 and the ten percent violation estimate assumed that the Bureau would not modify its operation of the Project as conditions changed. The Bureau could modify its operation, had done so in the past, and there was "nothing in the record [suggesting] that it will not continue to do so in the future." [[1069]](#footnote-1070)1069

In conclusion, the Ninth Circuit affirmed the district court's ruling and determined that the Delta parties failed to raise a genuine issue of material fact as to whether the Bureau would violate the Vernalis Salinity Standard. The Bureau's projection that it might violate the standard in the future was not enough considering that Congress in the CVPIA gave the Bureau discretion to deviate from its plan to meet standards and the Bureau had done so effectively for more than a decade. Therefore, the Court ruled that the Delta parties did not have a right to injunctive relief and affirmed the district court's opinion.

**[\*826]**

H. United Nations Convention on the Law of the Sea

1. Sarei v. Rio Tinto, PLC, 456 F.3d 1069 (9th Cir. 2006).

Former and current residents (Sarei) of Papua New Guinea (PNG) sued Rio Tinto, a London-based international mining company, in California district court under the Alien Tort Claims Act (ATCA), [[1070]](#footnote-1071)1070 alleging inter alia that Rio Tinto's PNG copper mining operations violated the United Nations Convention on the Law of the Sea (UNCLOS). [[1071]](#footnote-1072)1071 The district court dismissed Sarei's UNCLOS claim [[1072]](#footnote-1073)1072 under Federal Rule of Civil Procedure 12(b)(6), [[1073]](#footnote-1074)1073 holding that it presented a nonjusticiable political question. The Ninth Circuit held that the district court erred in dismissing the UNCLOS claim and remanded the case for consideration under the international comity doctrine and the act of state doctrine.

Sarei's claims arose from Rio Tinto's operation of a copper mine on Bougainville, a PNG island province. Rio Tinto shared 19.1% of the mine's profits with the PNG government in exchange for its assistance. [[1074]](#footnote-1075)1074 Sarei alleged that Rio Tinto engaged in racial discrimination and that the Bougainville mining operations polluted the island's water and atmosphere to the detriment of islanders' health. Sarei further alleged that, at Rio Tinto's request, the PNG government used its army to suppress a 1988 uprising that had forced the mine to close. Bougainvilleans sought to secede from PNG and there was a ten-year civil war, which allegedly devastated the island's environment and subjected its residents to various atrocities.

In 2001, Sarei sued in district court, and, in response to the court's request for guidance, the State Department issued a Statement of Interest (SOI). The SOI noted that the court did not seek comment on the act of state and political question doctrines, but provided that the State Department viewed the case's adjudication as a serious threat to continued amicable relations with PNG. [[1075]](#footnote-1076)1075 While finding that the UNCLOS claim fell within the scope of the ATCA [[1076]](#footnote-1077)1076 and that, if proven, Sarei's allegations supported Rio Tinto's liability for certain PNG government acts, [[1077]](#footnote-1078)1077 the district court dismissed the complaint because it presented a nonjusticiable political question. [[1078]](#footnote-1079)1078 The district court dismissed the UNCLOS claim, alternatively, under the doctrines of international comity [[1079]](#footnote-1080)1079 and act of state, [[1080]](#footnote-1081)1080 and denied plaintiffs' motion to file an amended complaint.

**[\*827]** In reviewing a dismissal under Federal Rule of Civil Procedure 12(b)(6), the Ninth Circuit accepts all facts asserted in a plaintiff's complaint as true and interprets them in the light most favorable to the plaintiff. [[1081]](#footnote-1082)1081

The Ninth Circuit began by addressing the issue of subject matter jurisdiction under the UNCLOS in the context of the Supreme Court's 2004 opinion, Sosa v. Alvarez-Machain. [[1082]](#footnote-1083)1082 The court noted that in Sosa, the Supreme Court held:

"Courts should require any [ATCA] claim filed based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined within a specificity comparable to the features of the 18th-century paradigm[]" causes of action for "offenses against ambassadors, violations of safe conduct … [and] piracy." [[1083]](#footnote-1084)1083

The court agreed with the district court that Sosa did not undermine the conclusion that alleged violations of the UNCLOS implicated "specific, universal and obligatory norms of international law" that form the proper basis for claims under the ATCA. [[1084]](#footnote-1085)1084 The Ninth Circuit noted that at least 149 nations had ratified the UNCLOS, an adequate number for it to form an ATCA claim's basis in customary, codified international law. [[1085]](#footnote-1086)1085

Next, the Ninth Circuit addressed Sarei's claim under the UNCLOS in the context of the act of state doctrine. The court provided that the doctrine curbs U.S. courts' inquiry into the propriety of a recognized foreign sovereign's public acts committed inside its territory, [[1086]](#footnote-1087)1086 out of concern that such inquiry would interfere with the President's direction of United States foreign policy. [[1087]](#footnote-1088)1087 Under the doctrine, an action may be enjoined if 1) it involves an "official act of a foreign sovereign performed within its own territory," and 2) "the relief sought or the defense interposed [in the action would require] a court in the United States to declare invalid the [foreign sovereign's] official act." [[1088]](#footnote-1089)1088

Even if the above two factors are present, the court noted that it has discretion to not apply the doctrine where such application would conflict with the doctrine's underlying policies. Three considerations in exercising this discretion were discussed by the Supreme Court in Sabbatino: 1) "the greater the degree of codification or consensus concerning a particular area **[\*828]** of international law, the more appropriate it is for the judiciary to render decisions regarding it ..."; 2) "the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches"; and 3) "the balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence." [[1089]](#footnote-1090)1089 The court noted that Rio Tinto had the burden of proving acts of state, [[1090]](#footnote-1091)1090 and reasoned that because Sarei alleged that PNG acted on the orders of Rio Tinto, PNG's actions were at issue even though PNG was not named as a defendant. [[1091]](#footnote-1092)1091

Therefore, the court needed to determine whether or not the actions were "official." The Ninth Circuit agreed with the district court's conclusion that non-commercial, official acts of state were involved in the UNCLOS claim because PNG acted pursuant to a statute codifying its relationship with Rio Tinto. Such acts were "public acts of the sovereign." [[1092]](#footnote-1093)1092 The court noted that, while UNCLOS codifies international law norms, it was unclear whether "the international community recognizes the norms as ones from which no derogation is permitted." [[1093]](#footnote-1094)1093 Therefore, the court could not conclude that the UNCLOS norms were also jus cogens norms, [[1094]](#footnote-1095)1094 such that PNG's acts in violation of UNCLOS could not also be considered official acts of state.

The Ninth Circuit reasoned that adjudication of Sarei's UNCLOS claim would require the courts to pass judgment on the propriety of PNG's official acts and proceeded to consider the district court's application of Sabbatino in determining whether or not the act of state doctrine prohibited further analysis. The court noted that the district court's application of the Sabbatino factors utilized the U.S. State Department's SOI in determining the adjudication's possible effect on the United States' foreign relations. Reasoning that the possible effect on foreign relations is only one aspect of analysis under Sabbatino, the Ninth Circuit directed the district court to reconsider its dismissal on act of state grounds in light of the appellate analysis of the SOI. The court also indicated that more facts might be needed to decide whether "the government which perpetrated the challenged act of state is [still] in existence." [[1095]](#footnote-1096)1095

Finally, the Ninth Circuit considered the district court's dismissal of the UNCLOS claim under the international comity doctrine. The court noted that **[\*829]** the international comity doctrine is a form of abstention in which courts decline to exercise otherwise valid jurisdiction in deference to the laws or interests of a foreign country. [[1096]](#footnote-1097)1096 The Ninth Circuit joined other circuits [[1097]](#footnote-1098)1097 in establishing that it reviews dismissals under the doctrine for abuse of discretion. The district court noted that exercise of its jurisdiction under the ATCA would be in conflict with PNG's Compensation (Prohibition of Foreign Proceedings) Act of 1995, which "prohibits the taking or pursuing in foreign courts of legal proceedings in relation to compensation claims arising from mining projects and petroleum projects in Papua New Guinea." [[1098]](#footnote-1099)1098 Based on the SOI, the district court reasoned that the United States' interests would best be served if it refused jurisdiction. Although it concluded that the district court did not abuse its discretion in declining jurisdiction based on the State Department's SOI, the Ninth Circuit directed the district court to revisit its reasoning based on appellate analysis of the SOI.

In conclusion, the Ninth Circuit held that the district court erred in dismissing the UNCLOS claim and remanded the case for consideration under the international comity doctrine and the act of state doctrine in light of its opinion.

I. Atomic Energy

1. Nuclear Information and Resource Service v. United States Department of Transportation, Research and Special Programs Administration, 457 F.3d 956 (9th Cir. 2006).

The Nuclear Information and Resource Service, Committee to Bridge the Gap, Public Citizen, Inc., Redwood Alliance, and Sierra Club (collectively NIRS) appealed a district court's decision to dismiss NIRS's challenge to a Department of Transportation (DOT) final rule amending its Hazardous **[\*830]** Materials Regulations (HMR). [[1099]](#footnote-1100)1099 NIRS had alleged that DOT violated the National Environmental Policy Act (NEPA) [[1100]](#footnote-1101)1100 by not preparing an Environmental Impact Statement (EIS) before issuing the final rule. The district court dismissed the action for lack subject matter jurisdiction. The Ninth Circuit reviewed de novo and affirmed the district court's dismissal for lack of subject matter jurisdiction, holding that the statutes governing the HMR provide for a specific grant of jurisdiction to the court of appeals where railroad safety is involved.

Under the Hazardous Materials Transportation Act (HMTA), [[1101]](#footnote-1102)1101 DOT has authority to designate certain materials as hazardous and to promulgate regulations for their safe transportation. [[1102]](#footnote-1103)1102 Under such authority, DOT promulgated the HMR, which regulate the transportation of radioactive materials in commerce by "rail car, aircraft, motor vehicle, or vessel." [[1103]](#footnote-1104)1103 In January 2004, DOT, in coordination with the Nuclear Regulatory Commission (NRC), issued a final rule that amended the HMR and "harmonized" [[1104]](#footnote-1105)1104 some of the HMR standards [[1105]](#footnote-1106)1105 with those of the International Atomic Energy Agency. In preparing the amendments, NRC conducted an Environmental Assessment pursuant to NEPA, and the assessment concluded that an EIS was not necessary. DOT relied on the assessment's finding and did not prepare an EIS.

In March 2004, NIRS filed suit against NRC over the final rule. NIRS filed this suit first in the Ninth Circuit Court of Appeals, alleging that NRC had violated NEPA by not preparing an EIS. Eight months later, NIRS filed a second suit against DOT. NIRS filed this suit in district court and made the same allegation against DOT as it had against NRC - that the agency had violated NEPA by not preparing an EIS for the final rule.

NIRS filed a motion to transfer the first case to the district court, but the Ninth Circuit denied the motion. Shortly thereafter, the district court granted DOT's motion to dismiss the second case on the ground that it lacked subject matter jurisdiction to hear the case. NIRS timely appealed, and the Ninth Circuit reviewed de novo. [[1106]](#footnote-1107)1106

Under the Administrative Procedures Act [[1107]](#footnote-1108)1107 and 28 U.S.C. § 1331, district courts generally have subject matter jurisdiction over NEPA claims. [[1108]](#footnote-1109)1108 If a federal statute, however, specifies that a court of appeals shall **[\*831]** review an agency action, such specific jurisdiction will trump general jurisdiction. [[1109]](#footnote-1110)1109 Relevant to the present case, the Federal Railroad Safety Act (FRSA) [[1110]](#footnote-1111)1110 contains a grant of specific jurisdiction. Section 20114(c) of FRSA provides that "a proceeding to review a final action of the Secretary of Transportation under this part or, as applicable to railroad safety, chapter 51 or 57 of this title shall be brought in the appropriate court of appeals provided in [the Hobbs Act]." [[1111]](#footnote-1112)1111 The Hobbs Act [[1112]](#footnote-1113)1112 has a reciprocal provision, which gives courts of appeal exclusive jurisdiction over actions seeking judicial review of "all final agency actions described in section 20114(c)" [[1113]](#footnote-1114)1113 of FRSA.

On review to the Ninth Circuit, NIRS argued that the court of appeals did not have exclusive jurisdiction over a challenge to DOT's rulemaking because legislative history showed that section 20114(c) applies only to actions solely affecting railroad regulation. NIRS argued that DOT's rule did not solely affect railroad, but was a multi-modal action that affected "rail car, aircraft, motor vehicle, or vessel." [[1114]](#footnote-1115)1114 DOT countered that section 20114(c) is not ambiguous, and thus the court had no reason to look beyond the plain meaning of the statute.

The Ninth Circuit agreed with DOT and held that section 20114(c) is not ambiguous. The court, however, disagreed with DOT's particular interpretation of the statute. DOT had argued that the phrase "as applicable to railroad safety" modified the noun "a final action," meaning that a court of appeals would have exclusive jurisdiction over a final action regarding railroad safety. The court explained that "as applicable to railroad safety" modifies the noun "chapter 51," meaning that the jurisdiction extends, not only to a final action regarding railroad safety, but to a final action brought under some part of chapter 51 that applies to railroad safety.

The Ninth Circuit explained that under DOT's reading of the statute, "there might be a question whether an action would be reviewable in the court of appeals only in so far as it applied to railroad safety, and reviewable in the district court in so far as it applied to other modes of transportation." [[1115]](#footnote-1116)1115 In contrast, the court held that "any action under the HMTA that affects railroad safety is an action under that statute as the statute is applicable to railroad safety, even if the action also deals with other modes of transportation." [[1116]](#footnote-1117)1116 The Ninth Circuit held that, because DOT issued that rule under the HMTA, as the HMTA applies to railroad safety, section 20114(c) governed the claim and gave exclusive jurisdiction to the courts of appeals even if the action was multi-modal.

**[\*832]** After clarifying that DOT's interpretation of the statute was incorrect, the Ninth Circuit reiterated that the section 20114(c) is not ambiguous. The court explained that "it is well established that "the plain meaning of the statute controls, and courts will look no further, unless its application leads to unreasonable or impracticable results.'" [[1117]](#footnote-1118)1117 Although the court held the statute was unambiguous such that no further inquiry was necessary, the court explained that, even if there was "any ambiguity as to whether jurisdiction lies with a district court or with a court of appeals we must resolve that ambiguity in favor of review by a court of appeals." [[1118]](#footnote-1119)1118

The Ninth Circuit also noted that, even if the legislative history had been relevant, NIRS's reliance on it was misplaced. NIRS specifically relied on an initial draft of section 20114(c) that used the words "applicable solely to railroads." [[1119]](#footnote-1120)1119 NIRS had argued that such language showed that the jurisdictional provision did not apply to the DOT's multi-modal legislation. The Ninth Circuit concluded that the wording from the initial draft of the legislation did not reflect Congress's intent, because Congress ultimately did not adopt it.

NIRS also argued that the district court should have transferred this case to the court of appeals, so that the appeals court could have decided this case together with NIRS's other similar suit against NRC. The Ninth Circuit rejected this argument, because district courts are only allowed to transfer actions to the appeals court to ""cure [a] want of jurisdiction' if the court of appeals would have been able to assert jurisdiction at the time the action was filed." [[1120]](#footnote-1121)1120 The Ninth Circuit explained that the Hobbs Act only allows transfers of actions to the court of appeals if the court of appeals could assert jurisdiction at the time the action was filed with the district court. [[1121]](#footnote-1122)1121 The Hobbs Act further requires that challenges to agency actions be filed with the appeals court within sixty days of the administrative appeal. [[1122]](#footnote-1123)1122 Since NIRS filed its appeal to the district court more than sixty days after the DOT denied an administrative appeal, the court of appeals could not have asserted jurisdiction over the appeal at the time NIRS filed in the district court, and the district court was therefore not permitted to transfer the case to the appeals court.

Thus, the Ninth Circuit rejected both of NIRS's arguments and affirmed the district court's findings with respect to jurisdiction and transfer. The Ninth Circuit first held that the district court lacked subject matter jurisdiction to hear NIRS' challenge to DOT's final rule, because section 20114(c) of FRSA governed NIRS' claim and gave exclusive jurisdiction to appeal courts. Secondly, the Ninth Circuit held the district court could not transfer the case to the appeals court because any initial appeal to that court would have been untimely.

**[\*833]**

2. San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission, 449 F.3d 1016 (9th Cir. 2006), supra Part I.B.

J. Grazing

1. Forest Guardians v. Johanns, 450 F.3d 455 (9th Cir. 2006), supra Part II.A.

2. Oregon Natural Desert Association v. United States Forest Service, 465 F.3d 977 (9th Cir. 2006), infra Part III.A.

III. Litigation Issues

A. Subject Matter Jurisdiction Under the Administrative Procedure Act

1. Northwest Environmental Defense Center v. Bonneville Power Administration, 477 F.3d 668 (9th Cir. 2007).

Northwest Environmental Defense Center, Public Employees for Environmental Responsibility, and Northwest Sportfishing Industry Association, together with the Confederate Tribes and Bands of the Yakama Nation (Petitioners) petitioned the Ninth Circuit for review of Bonneville Power Administration's (BPA) decision to transfer the functions of the Fish Passage Center (FPC) to two private entities - Battelle Pacific Northwest National Laboratory (Battelle) and Pacific States Marine Fisheries Commission (Pacific States) - under the new model Fish Passage Center (new model). After finding that the court had jurisdiction to hear the case, and that the Petitioners had standing, the Ninth Circuit granted the petition for review and held that BPA's decision to transfer the functions of the FPC to the two private entities was arbitrary, capricious, and contrary to law. Accordingly, the court ordered BPA to continue funding the FCP until it can properly transfer the functions.

The BPA, created by the Bonneville Project Act, [[1123]](#footnote-1124)1123 is a federal agency within the Department of Energy that sells and transmits electricity from federal and non-federal hydroelectric and nuclear energy plants and uses the money from the sale and transmission of electricity to fund its operations. [[1124]](#footnote-1125)1124 In addition to BPA's responsibilities to sell low cost energy to its customers, **[\*834]** BPA must "be environmentally conscious, supporting energy conservation and protecting the fish and wildlife of the Columbia River basin." [[1125]](#footnote-1126)1125 To enable BPA to meet this requirement, Congress passed the Pacific Northwest Power Planning and Conservation Act (Northwest Power Act or the Act), [[1126]](#footnote-1127)1126 allowing the state governments of Idaho, Montana, Oregon, and Washington to form an interstate compact agency - the Northwest Power and Conservation Council (the Council). The Council is charged with two tasks: creating and reviewing a conservation and electric power plan (Power Plan) and creating and reviewing a "program to protect, mitigate, and enhance fish and wildlife" (Fish and Wildlife Program). [[1127]](#footnote-1128)1127 Any new project proposed as part of the Fish and Wildlife Program is submitted by the Council to the Independent Scientific Review Panel (the Panel) for review, which is composed of independent scientists appointed by the Council from recommendations. The Northwest Power Act also requires that BPA consult with Indian tribes and state agencies when carrying out responsibilities under the Act. Thus, the Act creates a system of cooperative federalism.

Under the Northwest Power Act, all of BPA's fish and wildlife actions must be consistent with the Council's Power Plan and its Fish and Wildlife Plan as well as the Northwest Power Act - this is called the "consistency requirement." [[1128]](#footnote-1129)1128 In 2000, the Council adopted the current Fish and Wildlife Program (2000 Program), and amended it in 2003 (2003 Amendments). The 2000 Program's objectives are to "mitigate the adverse effects to salmon and steelhead caused by the Columbia River's hydropower system and ensuring sufficient populations of salmon and steelhead for both Indian tribal-trust and treaty-right fishing and non-tribal fishing." [[1129]](#footnote-1130)1129 The 2000 Program's stated goal is to "increase total adult salmon and steelhead runs on the Columbia River from about one million annually today to an average of five million annually by 2025." [[1130]](#footnote-1131)1130 The FPC has been part of the Fish and Wildlife Program from its inception and in 1987, the Council stated that BPA would be responsible for funding the FPC. The 2000 Program provides for the continued operation of the FPC, and the 2003 Amendments confirmed the place of the FPC within the Fish and Wildlife Program, stating that the FPC's purpose is to give technical assistance and information to agencies and tribes about issues relating to salmon and steelhead passage through the hydrosystem. [[1131]](#footnote-1132)1131 To meet the requirements, the FPC monitors over twenty **[\*835]** dams and collects information about fish and river conditions that it makes generally available; agencies and tribes use the information for water spill and flow requests. While the FPC is not a separate legal entity, and is funded by BPA, it operates independently of BPA.

In 2005, the U.S. Senate Appropriations Subcommittee on Energy and Water Development delivered its report on House Resolution 2419 (Subcommittee Report), wherein it stated that "BPA may make no new obligations from the Bonneville Power Administration Fund in support of the Fish Passage Center" because there are universities in the Pacific Northwest that already collect fish data for the region and can carry out the FPC's responsibilities at a savings to the region's taxpayers." [[1132]](#footnote-1133)1132 House Resolution 2419 became the Energy and Water Development Appropriations Act of 2006 (2006 Appropriations Act), and was passed on November 19, 2005. While the text of the 2006 Appropriations Act made no reference to the FPC, the Conference Committee Report (Committee Report) echoed the Subcommittee's report by stating "the Bonneville Power Administration may make no new obligations in support of the Fish Passage Center" and calls for transfer of the FPC's operations to other groups in the region that are capable of continuing those functions. [[1133]](#footnote-1134)1133 Following the passage of the 2006 Appropriations Act, BPA issued a Program Solicitation, asking other groups to take over the functions of the FPC and on January 26, 2006, BPA awarded contracts to Battelle and Pacific States to take over the functions of the FPC under a new model that split the functions of the FPC between the two entities. Accordingly, BPA executed contracts with Battelle and Pacific States in early 2006. In response to the contract awards, the Petitioners filed petitions for review challenging BPA's transfer of functions from FPC to Battelle and Pacific States. [[1134]](#footnote-1135)1134 On March 17, 2006, the Ninth Circuit granted a stay pending review, and ordered BPA to continue funding and supporting the FPC.

The Ninth Circuit first addressed whether the court had jurisdiction to hear the appeal. BPA argued that the court did not have statutory jurisdiction because the Program Solicitation was not a final action. Under the Northwest Power Act, the Ninth Circuit has original and exclusive **[\*836]** subject-matter jurisdiction to hear "final actions and decisions taken pursuant to [the Act] by the Administrator [of BPA] or the Council or the implementation of such final actions." [[1135]](#footnote-1136)1135 While BPA argued that the Program Solicitation was not a final action, it conceded that the selection of Battelle and Pacific States to succeed FPC was a final action under the Act. Thus, the court determined that it had statutory jurisdiction to hear the case because the petitioners challenged the selection of the successors to the FPC.

The court next addressed BPA's second jurisdictional challenge: that the Petitioners lacked Article III standing because petitioners' injury could not be redressed. To have constitutional standing, the petitioner must show that they have suffered an injury in fact that is concrete and particularized, and actual or imminent, that the injury was caused by the conduct complained of, and that a favorable court decision will redress the injury. [[1136]](#footnote-1137)1136 The Petitioners sought to have the court set aside BPA's decision to transfer the functions of the FPC to Battelle and Pacific States and to order BPA to continue funding the FPC. BPA's core argument was that because it has funded the FPC through a grant that had expired, a court order forcing it to continue funding the FPC would force BPA to contract against its will, which the court lacks the power to require. The court pointed out that with respect to contracts between private parties, the court has no authority to require the parties to complete obligations not contained within the contract. However, in the present case, the Petitioners requested a remedy for a violation of the Administrative Procedure Act (APA) [[1137]](#footnote-1138)1137 - a public law. Under section 706(2) of the APA, the court has equitable power to set aside agency actions that are arbitrary, capricious, or contrary to law. [[1138]](#footnote-1139)1138 Thus, when dealing with public laws, the court is not confined to the terms of the contract and may use its equitable powers to remedy violations of the law. The court turned to United States v. Alisal Water Corp. [[1139]](#footnote-1140)1139 and Fed. Trade Comm'n v. H.N. Singer, Inc., [[1140]](#footnote-1141)1140 which both support the court's ability to use its equitable powers when the public interest is involved. Accordingly, the court determined that if it concluded that BPA violated the APA, it had the power to remedy BPA's violation by ordering "BPA to continue to fund the FPC, at least for a period of time in which BPA can reconsider its action." [[1141]](#footnote-1142)1141 Petitioners thus presented a redressable injury and consequently had standing.

The Ninth Circuit then turned to the Petitioners two challenges to BPA's actions under the APA: that BPA's decision to transfer the functions of the FPC based on language not in a statute but in the Committee Report was contrary to law, and that BPA acted arbitrarily and capriciously in **[\*837]** transferring the function of the FPC because it was not the result of a rational decision making process. [[1142]](#footnote-1143)1142 In addressing Petitioners first argument, the court noted that while the actual language of the 2006 Appropriations Act did not reference the FPC, both the Committee Report and the Subcommittee Report stated that BPA was not to continue funding the FPC. [[1143]](#footnote-1144)1143 The court stated that BPA "slavishly deferred to what it thought the reports commanded," [[1144]](#footnote-1145)1144 as evidenced by statements in the Program Solicitation and emails from the Vice President of BPA suggesting the Committee Report imparted a legal obligation on BPA to cease funding the FPC and transfer its functions. The Ninth Circuit stated that:

the case law of the Supreme Court and our court established that legislative history, untethered to text in an enacted statute, has no compulsive legal effect. It was thus contrary to law for BPA to conclude, from committee report language alone, that it was bound to transfer the functions of the FPC. [[1145]](#footnote-1146)1145

The court turned to Shannon v. United States, [[1146]](#footnote-1147)1146 wherein the Supreme Court stated that "courts have no authority to enforce [a] principle gleaned solely from legislative history that has no statutory reference point." [[1147]](#footnote-1148)1147 Thus, the Ninth Circuit pointed out that language in committee reports that is not attached to language in an enacted statute does not legally bind anyone, including agencies. This understanding is supported by Article I, section 7, clause 2 of the Constitution, which outlines the process for creating legally binding laws and requires that all laws that seek to create legal obligations conform to bicameralism and presentment requirements. [[1148]](#footnote-1149)1148 Therefore, because the Committee Report did not go through the process outlined by the Constitution, BPA acted contrary to law when it gave legally binding effect to the language contained in the Committee Report.

In addition to violating the Constitution, the court determined that BPA's reliance on the language in the Committee Report was contrary to the Northwest Power Act. The court opined that by creating the Council the Act "contemplates a participatory process in which the varied constituencies of the Pacific Northwest advise BPA on how it should exercise its discretion." [[1149]](#footnote-1150)1149 Therefore, by not relying on the Council to make changes to **[\*838]** the plan and programs, and instead relying on language in the Committee Report, BPA ignored the cooperative system that the Act established. Accordingly, the court determined that by treating the Committee Report language as having legally binding effect, BPA acted contrary to the Fish and Wildlife Program, which called for the continuance of the FPC, as well as the consistency requirement of the Act, which requires BPA's actions be consistent with the Fish and Wildlife Program.

In outlining its power to overrule BPA's actions, the court turned to Securities and Exchange Commission v. Chenery [[1150]](#footnote-1151)1150 for the proposition that "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained," [[1151]](#footnote-1152)1151 meaning that the court must set aside BPA's transfer of the FPC functions unless BPA relied on other grounds besides the Committee Report in making its decision. With this understanding, the court turned to BPA's argument that even if it could not base its decision on the language in the Committee Report, its decision was a logical application of the Act's mandate that BPA use its power consistently with the Fish and Wildlife Program. Before addressing BPA's argument, the court noted that its scope of review under the APA was narrow, and that the court can only consider "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." [[1152]](#footnote-1153)1152 An agency has acted arbitrarily and capriciously if it considered factors that Congress did not direct the agency to consider, or failed to consider important factors, or provided an explanation that is contrary to or unsupported by the evidence, such that it goes beyond a valid difference in understanding and is not the result of the agency's expertise. [[1153]](#footnote-1154)1153

Turning to address the case at hand, the court noted that BPA stopped funding a unitary FPC (which was BPA's established practice), and transferred the functions to two entities. While the court noted that an agency is permitted to alter its practices for the public interest, the court looked to Greater Boston Television Corp. v. Fed. Communication Commission [[1154]](#footnote-1155)1154 for the understanding that when changing established practices, the agency is required to provide an analysis that demonstrates that the change was the result of calculated reasoning, and that the prior practice was not simply being ignored without reason. [[1155]](#footnote-1156)1155 Thus, the Ninth Circuit reasoned that to decide whether BPA acted arbitrarily and capriciously, it must only look at BPA's explanations at the time it made the decision, not subsequent explanations. [[1156]](#footnote-1157)1156 The court determined that BPA did not consider the relevant factors at the time of its decision, nor did the **[\*839]** agency employ a rational decision making process, as there was no indication from the record that BPA relied on any other factor in making its decision besides its misplaced reliance on the Committee Report. The court rejected BPA's claim that a PowerPoint slide, which suggested that Batelle and Pacific States were the most qualified entities that responded to the Program Solicitation, provided evidence of a rational decision making process, stating that even if the slide could show a rational decision, there was no indication that BPA used a rational process because the slide was shown the same day that BPA announced that it was transferring the functions of the FPC to Battelle and Pacific States. The court similarly rejected a memorandum from BPA comparing the functions of the unitary model to the new model FPC as evidence of a decision making process because the memorandum was drafted six weeks after BPA transferred the functions to Battelle and Pacific State.

The court distinguished the present case from Confederated Tribes of the Umatilla Indian Reservation v. Bonneville Power Admin. [[1157]](#footnote-1158)1157 where the court held that BPA's decision to implement biological opinions was consistent with the Fish and Wildlife Program and the Act because the record showed that BPA considered the relevant factors in making its decision. In the present case, the court noted that the only pieces of evidence that BPA considered its requirements under the Act were six letters stating that BPA was transferring the functions of the FPC to comply with the agency's statutory mandate to protect fish and wildlife. However, the letters did not reveal the process that BPA employed to come to its decision. The court opined that to comply with the Act, BPA should have indicated its reasons for transferring the functions of the FPC and explained how its decision was consistent with the Fish and Wildlife Program and the Northwest Power Act.

The court analogized the present case to Motor Vehicles Manufacturing Association v. State Farm Mutual Automobile Insurance Co., [[1158]](#footnote-1159)1158 where the Supreme Court determined that the National Highway Traffic Safety Administration's decision to withdraw a rule mandating car manufacturers to put passive restraints in cars was arbitrary and capricious because the agency failed to provide findings supporting it decision, as well as failed to explain its basis for the decision. [[1159]](#footnote-1160)1159 Similar to State Farm, BPA did not adequately explain its decision, and there was nothing in the record demonstrating that the decision was based on a rational decision making process. Therefore, the court determined that BPA's decision to transfer the functions of the FPC to Battelle and Pacific States was arbitrary and capricious.

In conclusion, the Ninth Circuit granted the petition for review, determining that BPA's reliance on statements in the Committee Report to the 2006 Appropriations Act was not an adequate reason for transferring the **[\*840]** functions of the FPC, and that BPA had failed to show that it had used a rational decision making process to reach its decision. Thus, the court held that BPA acted arbitrarily, capriciously, and contrary to law when it decided to transfer the functions of the FPC to Battelle and Pacific States. Accordingly, the court set aside BPA's decision and ordered BPA to continue to fund and support the FPC until it could provide a legitimate basis for transferring the functions.

2. Oregon Natural Desert Association v. United States Forest Service, 465 F.3d 977 (9th Cir. 2006).

Oregon Natural Desert Association (ONDA) appealed a judgment that the United States Forest Service's (USFS) issuance of annual operating instructions (AOIs) was not a final agency action for purposes of judicial review under the Administrative Procedure Act (APA). [[1160]](#footnote-1161)1160 The Ninth Circuit reversed and remanded, holding that USFS's issuance of an AOI constituted a "final agency action" and was thus reviewable under the APA because the AOI created binding legal obligations on the permit holder with the possibility of sanctions for non-compliance, and USFS expected the terms of the AOI to be instituted immediately.

Pursuant to the Federal Land Policy Management Act (FLPMA), [[1161]](#footnote-1162)1161 USFS approves and manages livestock grazing on allotments on national forest land by: issuing grazing permits [[1162]](#footnote-1163)1162 (usually for ten years), [[1163]](#footnote-1164)1163 creating Allotment Management Plans (AMPs), [[1164]](#footnote-1165)1164 and formulating AOIs. A grazing permit authorizes the permit holder to use national forest lands for grazing [[1165]](#footnote-1166)1165 and sets out "(1) the number, (2) kind, (3) and class of livestock, (4) the allotment to be grazed, and (5) the period of use." [[1166]](#footnote-1167)1166 The limits in the permit are established in accordance with the land and resource management plan for the particular forest-unit. [[1167]](#footnote-1168)1167 USFS must also create an AMP for each allotment establishing the necessary parameters for the allotment to meet the requirements of "multiple-uses, sustained yield, economic, and other needs and objectives." [[1168]](#footnote-1169)1168 AMP parameters may include grazing restrictions and must comply with the law [[1169]](#footnote-1170)1169 and the applicable forest management plan. [[1170]](#footnote-1171)1170 In addition to the forest management plan, and **[\*841]** the AMP, USFS issues an AOI to each permit holder at the start of the grazing season. In essence, the AOI takes the requirements of the forest management plan, the AMP, and the grazing permit, and establishes parameters for annual operations. [[1171]](#footnote-1172)1171 The AOI is considered part of the grazing permit, controlling permit holders' actions for the year. Because AOIs are issued annually, they allow USFS to respond to changed circumstances by imposing conditions that were not included in the AMP or grazing permit. [[1172]](#footnote-1173)1172

In 1988, pursuant to the Wild and Scenic Rivers Act (WSRA), [[1173]](#footnote-1174)1173 Congress set aside portions of the North Fork Malheur and Malheur Rivers as wild and scenic river corridors. Under the 1990 Malheur National Forest Land and Resource Management Plan, over 10,000 acres of land adjacent to the river corridors were designated for grazing allotments. In the present case, ONDA challenged management decisions made by USFS pertaining to grazing on six of those allotments between 2000 and 2004. Specifically, ONDA alleged that: USFS violated the APA by issuing AOIs to permit holders for pastures on protected parts of the rivers, and that the contents of the AOIs violated USFS's duties under WSRA, the National Forest Management Act (NFMA), [[1174]](#footnote-1175)1174 the National Environmental Policy Act (NEPA), [[1175]](#footnote-1176)1175 and the agency's regulations. The first district court judge to hear the case denied USFS's motion to dismiss for lack of jurisdiction, determining that the AOIs constituted final agency actions under the APA, thus allowing for judicial review of the claims under the APA. [[1176]](#footnote-1177)1176 ONDA's motion for a preliminary injunction, however, was denied. Following that denial, the parties filed cross-motions for summary judgment and the case was transferred to a different district court judge who found that while an AOI was an agency action, it was not a "final agency action." Additionally, the court determined that it lacked subject matter jurisdiction to hear ONDA's WSRA claims and dismissed the case.

As the statutes under which ONDA sought relief do not give a private right of action, [[1177]](#footnote-1178)1177 ONDA made its claims under the APA. To obtain judicial review under the APA, the agency's action must be final. [[1178]](#footnote-1179)1178 An agency action is final if it "(1) marks the consummation of the agency's decision **[\*842]** making process and (2) [is] one by which rights or obligations have been determined, or from which legal consequences will flow." [[1179]](#footnote-1180)1179 The Ninth Circuit identified the crux of this question as "whether the agency has completed its decision making process, and whether the result of that process is one that will directly affect the parties." [[1180]](#footnote-1181)1180 Additionally, the court stated that when determining whether the agency action is final, the court will consider whether the action "amounts to a definitive statement of the agency's position, or has a direct and immediate effect on the day-to-day operations of the subject party, or if immediate compliance [with the terms] is expected." [[1181]](#footnote-1182)1181 The Ninth Circuit emphasized that the court would focus on the "practical and legal effects of the agency action" [[1182]](#footnote-1183)1182 and that the finality of an agency action should be interpreted in a "pragmatic and flexible manner." [[1183]](#footnote-1184)1183

The court turned to the USFS's argument that the court did not have subject matter jurisdiction because the AOI was not a final agency action as it merely implemented the Forest Plan and grazing permit and that the AOI was not even an agency action based on the holding in Norton v. Southern Utah Wilderness Alliance (SUWA). [[1184]](#footnote-1185)1184

The Ninth Circuit first considered whether the AOI was an agency action under SUWA. While the Supreme Court in SUWA stated that agency actions are "limited to the specific categories defined by the APA" [[1185]](#footnote-1186)1185 the court also indicated that the definition of an agency action also includes "the equivalent or denial thereof, or failure to act." [[1186]](#footnote-1187)1186 Despite an AOI not being listed in the APA, the Ninth Circuit concluded that because a license is defined as the "whole or []part of an agency permit," [[1187]](#footnote-1188)1187 and USFS regards the AOIs as part of the grazing permit, AOIs are licenses under the APA, and the issuance of an AOI thus constitutes an agency action.

The Ninth Circuit then applied the Supreme Court's test under Bennett v. Spear [[1188]](#footnote-1189)1188 to determine whether the issuance of an AOI is a final action. The first part of the test asks whether the agency action is the consummation of the decision making process, [[1189]](#footnote-1190)1189 meaning the agency has issued its final decision on the matter. [[1190]](#footnote-1191)1190 The court considered the purpose of the AOIs in making its determination; AOIs establish annual grazing limits, taking into account changes in the pastures, new science, new rules, and **[\*843]** compliance with the prior AOI. Thus, AOIs are a "critical instrument in the Forest Service's regulation of grazing on national forest lands" [[1191]](#footnote-1192)1191 because they ensure that the grazing permit conforms to the forest plan and federal law. The Ninth Circuit looked to Idaho Watersheds Project v. Hahn to support its conclusion. In Idaho Watersheds Project, the court determined that there had been a final agency action when the Bureau of Land Management (BLM) issued a grazing permit because the agency had reached a final decision and put that decision into effect by issuing the permit. [[1192]](#footnote-1193)1192 In analogizing Idaho Watersheds Project to the present case, the court noted that USFS reached a final decision to allow grazing in the Malheur National Forest, and to issue permits putting that decision into effect. Additionally, USFS retained the ability to add terms and conditions to the grazing permit on an annual basis, by issuing AOIs. Thus, AOIs are USFS's final determination before the permit holder is able to graze livestock for the season. [[1193]](#footnote-1194)1193 Therefore, the court reasoned, AOIs are the consummation of USFS's decision making process regarding grazing allotments.

The Ninth Circuit rejected USFS's argument that because AOIs only put into place prior decisions made by the USFS, they are not final agency actions. The Ninth Circuit turned to Abramowitz v. Envt'l Protection Agency [[1194]](#footnote-1195)1194 for the proposition that the effect of the action, not the label, defines an agency action, [[1195]](#footnote-1196)1195 and to Oregon v. Ashcroft [[1196]](#footnote-1197)1196 for the statement that "finality is to be interpreted in a pragmatic way." [[1197]](#footnote-1198)1197 While the Ninth Circuit acknowledged that the USFS was correct in stating that the grazing permit binds the permit holder to the applicable forest plans and federal laws, the court clarified that AOIs are the vehicle for ensuring annual compliance with the forest plan and laws.

The court then turned to part two of the Bennett test, which states that the agency action resulting from the consummation of the decision making process is final if "rights or obligations have been determined, or … legal consequences will flow." [[1198]](#footnote-1199)1198 In Bennett, the Court determined that the second part of the test was met because the action altered the legal system governing the Secretary of the Interior. [[1199]](#footnote-1200)1199 The Ninth Circuit sought to clarify the holding in Bennett by pointing out that the Court did not hold that the only way for an action to qualify as final is to alter the legal regime. The Ninth Circuit turned to Ukiah Valley Medical Center v. Fed. Trade Comm'n [[1200]](#footnote-1201)1200 for rule that an agency action is final if it has a "direct and **[\*844]** immediate … effect on the day-to-day business' of the subject party"; in making its determination, the court would consider "whether the [action] has the status of law or comparable legal force, and whether immediate compliance with its terms is expected." [[1201]](#footnote-1202)1201 The court also looked to Anchustegui v. Department of Agriculture [[1202]](#footnote-1203)1202 to support the determination that AOIs have legal consequences. [[1203]](#footnote-1204)1203

The Ninth Circuit then identified two bases that illustrate the finality of the AOIs at hand: notices of non-compliance and USFS's threat of actions against two ranches grazing in the Malheur National Forest for violations of the AOIs and grazing permits, and the use of AOIs to impose endangered species standards. Under the APA, USFS may issue a Notice of Non-Compliance (NONC) to permit holders. [[1204]](#footnote-1205)1204 In the present case, USFS issued two NONCs to ranches grazing in the Malheur National Forest. As a result of non-compliance, administrative sanctions involving modifications of the grazing permit were imposed on one ranch. The Ninth Circuit rejected the USFS's argument that because sanctions against an AOI violation are based on the permit, the AOI does not have a legal effect. The Ninth Circuit adopted the district court's reasoning, restating that "simply because an AOI's authority is drawn from the permit does not make the agency's decision reflected in the AOI any less of a final agency action." [[1205]](#footnote-1206)1205 The Ninth Circuit determined that USFS's ability to initiate enforcement action against the permit holder based on a violation of an AOI demonstrates the legal force of the AOI and shows that USFS expects "immediate compliance with its terms." [[1206]](#footnote-1207)1206

The court then considered the fact that USFS used AOIs to implement standards issued under the Endangered Species Act (ESA) [[1207]](#footnote-1208)1207 to protect the threatened bull trout. After the bull trout was listed, USFS primarily used AOIs to implement the bull trout standards for the grazing permits within the Malheur National Forest. The court determined that the use of the AOIs to impose ESA standards showed that AOIs "restrict[] the rights of and confer[] duties on a grazing permit holder," [[1208]](#footnote-1209)1208 and therefore fixed the legal relationship between the USFS and the permit holder. The Ninth Circuit rejected the USFS's final argument that permit holders could still graze the allotment without an AOI, provided they complied with their permits. The court looked to the reality that permits require annual USFS approval, which is granted along with the issuance of an AOI, and the AOI contains the specific terms and conditions that the permit holder must meet to graze in the coming year. Thus, the Ninth Circuit held that AOIs constitute final agency actions.

**[\*845]** The Ninth Circuit concluded that USFS's issuance of an AOI constituted a "final agency action" under section 704 of the APA because: the AOI was the final determination of the agency for the year, it created binding legal obligations on the permit holder with the possibility of sanctions for non-compliance, and USFS expected the terms of the AOI to be instituted immediately. The court concluded that as a "final agency action," an AOI is judicially reviewable under section 706(2)(A) of the APA. The Ninth Circuit reversed the district court's decision and remanded the case to determine the merits of the claims.

Judge Fernandez dissented from the majority's opinion because he believed that the final agency action reviewable under the APA was the issuance of the grazing permit, not the issuance of an AOI. While Judge Fernandez acknowledged that AOIs implement changes in the grazing program, he looked to the characterization of the AOIs by the USFS to support his view that AOIs are not final agency actions. Relying on City of San Diego v. Whitman [[1209]](#footnote-1210)1209 for the proposition that the characterization of an action by the agency is informative about the type of the action, [[1210]](#footnote-1211)1210 Judge Fernandez thought it significant that the USFS did not view AOIs as a final agency action but as a way to manage the grazing program and implement the permits. Instead of following the majority's reasoning, Judge Fernandez adopted a pragmatic approach to determine what constitutes a final agency action by espousing the "implementation concept." This concept states that "if [the agency action] is merely implementing an earlier truly final determination, it is not final action for APA review purposes." [[1211]](#footnote-1212)1211 In Judge Fernandez's view, an AOI implements a permit that had already been issued and impacts the day-to-day decisions of the permit holder; therefore it is not reviewable. Judge Fernandez looked to Norton v. Southern Utah Wilderness Alliance [[1212]](#footnote-1213)1212 for the principle that it is not the role of the judge to manage the day-to-day workings of the agency. [[1213]](#footnote-1214)1213 Finally, Judge Fernandez expressed concern that allowing review of all AOIs would prevent the cattle from grazing, thereby frustrating the purpose of the grazing program.

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1. 1 Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§9601-9675 (2000). [↑](#footnote-ref-2)
2. 2 See 4 William H. Rodgers, Jr., Environmental Law: Hazardous Wastes and Substances § 8.7(C) (Supp. 2005) (stating that the NPL "is a compilation of uncontrolled hazardous substances releases in the United States that are "priorities' for long-term evaluation and response," but, "iinclusion of a site or facility on the list requires no action, assigns no liability, and does not pass judgment on the owner or operator… . the key consequence of being listed is that only NPL sites qualify for [Superfund] financed remedial action."). [↑](#footnote-ref-3)
3. 3 See 40 C.F.R. § 300.430(a)(2) (2006) (describing purpose of RI/FS).

   The purpose of the [RI/FS] is to assess site conditions and evaluate alternatives to the extent necessary to select a remedy. Developing and conducting an RI/FS generally includes the following activities: project scoping, data collection, risk assessment, treatability studies, and analysis of alternatives. The scope and timing of these activities should be tailored to the nature and complexity of the problem and the response alternatives being considered.

   Id. [↑](#footnote-ref-4)
4. 4 Administrative Order on Consent for Remedial Investigation/Feasibility Study at 2, In re Upper Columbia River Site, No. CERCLA-10-2004-0018 (Dec. 11, 2003), available at http://yosemite.epa.gov/R10/CLEANUP.NSF/UCR/Enforcement. [↑](#footnote-ref-5)
5. 5 42 U.S.C. § 9601(21). [↑](#footnote-ref-6)
6. 6 Id. § 9607(a)(3). [↑](#footnote-ref-7)
7. 7 Id. [↑](#footnote-ref-8)
8. 8 See 28 U.S.C. § 1292(b) (2000) (giving a district court the discretion to certify for immediate appeal an otherwise unappealable order if the judge is "of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation"). [↑](#footnote-ref-9)
9. 9 Torres-Lopez v. May, 111 F.3d 633, 638 (9th Cir. 1997). [↑](#footnote-ref-10)
10. 10 Decker v. Advantage Fund Ltd., 362 F.3d 593, 595-96 (9th Cir. 1997). [↑](#footnote-ref-11)
11. 11 Federal Water Pollution Control Act, 33 U.S.C.§§1251-1387 (2000). [↑](#footnote-ref-12)
12. 12 Clean Air Act, 42 U.S.C. §§7401-7671q (2000). [↑](#footnote-ref-13)
13. 13 Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§6901-6992k (2000) (amending Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 992). [↑](#footnote-ref-14)
14. 14 42 U.S.C. § 9601(9). [↑](#footnote-ref-15)
15. 15 Id. § 9607(a)(4). [↑](#footnote-ref-16)
16. 16 Id. [↑](#footnote-ref-17)
17. 17 See id. § 9601(9) (defining "facility" as "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise comes to be located"). [↑](#footnote-ref-18)
18. 18 See 3550 Stevens Creek Assocs. v. Barclays Bank of Cal., 915 F.2d 1355, 1360 n.10 (9th Cir. 1990) ("The term facility has been broadly construed by the courts, such that in order to show that an area is a facility, the plaintiff need only show that a hazardous substance under CERCLA is placed there or has otherwise come to be located there." (internal quotation marks omitted)). [↑](#footnote-ref-19)
19. 19 See 42 U.S.C. § 9601(22) (2000) (defining "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment"). [↑](#footnote-ref-20)
20. 20 Pakootas v. Teck Cominco Metals, 452 F.3d 1066, 1075 (9th Cir. 2006). [↑](#footnote-ref-21)
21. 21 42 U.S.C. § 9607(a)(3) (2000). [↑](#footnote-ref-22)
22. 22 544 U.S. 385, 390-91 (2005). [↑](#footnote-ref-23)
23. 23 18 U.S.C. § 922(g)(1) (2000). [↑](#footnote-ref-24)
24. 24 16 U.S. (3 Wheat.) 610 (1818) (holding that although a statute's definition of "persons" did not specifically include foreign parties, the statute still applied to foreign parties). [↑](#footnote-ref-25)
25. 25 Id. at 631. [↑](#footnote-ref-26)
26. 26 See Smith v. Idaho, 392 F.3d 350, 355 n.3 (9th Cir. 2004) (citing the "longstanding rule that personal jurisdiction, in the traditional sense, can be waived and need not be addressed sua sponte"). [↑](#footnote-ref-27)
27. 27 Wash. Rev. Code § 4.28.185 (2005). [↑](#footnote-ref-28)
28. 28 See Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1486 (9th Cir. 1993) (holding that "personal jurisdiction can be predicated on (1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered - and which the defendant knows is likely to be suffered - in the forum state"). [↑](#footnote-ref-29)
29. 29 42 U.S.C. § 9601(8) (2000). [↑](#footnote-ref-30)
30. 30 Id. (emphasis added). [↑](#footnote-ref-31)
31. 31 See ARC Ecology v. U.S. Dep't of the Air Force, 411 F.3d 1092, 1096-98 (9th Cir. 2005) (citing legislative history demonstrating Congress intended CERCLA to apply to cleanup hazardous waste sites in the United States). [↑](#footnote-ref-32)
32. 32 42. U.S.C. § 9607(a)(4) (2000). [↑](#footnote-ref-33)
33. 33 See Cadillac Fairview/California v. United States (Cadillac Fairview/California I), 41 F.3d 562, 565-66 (9th Cir. 1994) (holding that a party that sold a product to another party "arranged for disposal" of a hazardous substance); Cadillac Fairview/California v. Dow Chem. Co. (Cadillac Fairview/California II), 299 F.3d 1019, 1029 (9th Cir. 2002) (characterizing the conduct at issue in Cadillac Fairview/California I as "legal at the time"). [↑](#footnote-ref-34)
34. 34 Pakootas v. Teck Cominco Metals, 452 F.3d 1066, 1079 (9th Cir. 2006). [↑](#footnote-ref-35)
35. 35 42 U.S.C. § 9607(a)(3) (2000) (emphasis added). [↑](#footnote-ref-36)
36. 36 See Cadillac Fairview/California I, 41 F.3d at 565 (interpreting CERCLA).

    Liability is not limited to those who own the hazardous substances, who actually dispose of or treat such substances, or who control the disposal or treatment process. The language explicitly extends liability to persons "otherwise arranging" for disposal or treatment of hazardous substances whether owned by the arranger or "by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity."

    Id. (quoting 42 U.S.C. § 9607(a)(3) (2000)). [↑](#footnote-ref-37)
37. 37 976 F.2d 1338, 1341 (9th Cir. 1992) (suggesting Teck's construction may be appropriate, stating: "Nor has [Plaintiff] alleged that [Defendant] arranged for the contaminated soil to be disposed of "by any other party or entity' under 9607(a)(3)"). [↑](#footnote-ref-38)
38. 38 See Cadillac Fairview/California I, 41 F.3d at 565 n.4 (stating § 9607(a)(3) "must be given a "liberal judicial interpretation … consistent with CERCLA's overwhelmingly remedial statutory scheme'" (quoting United States v. Aceto Agric. Chem. Corp., 872 F.2d 1373, 1380 (8th Cir. 1989)). [↑](#footnote-ref-39)
39. 39 National Environmental Policy Act of 1969, 42 U.S.C.§§4321-4370e (2000). [↑](#footnote-ref-40)
40. 40 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-41)
41. 41 These areas were designated under the Sierra Nevada Framework to protect California spotted owl habitat. See Earth Island Inst. v. U.S. Forest Serv. (Earth Island I), 351 F.3d 1291, 1296 (9th Cir. 2003) (summarizing the Sierra Nevada Framework provisions protecting the spotted owl). [↑](#footnote-ref-42)
42. 42 36 C.F.R. § 215.10 (2006). The Emergency Determination was requested on June 16, 2005 and granted July 1, 2005. [↑](#footnote-ref-43)
43. 43 Both RODs chose the alternative that generated the greatest revenue: $ 19,056,425 for the Power Project and $ 3,345,872 for the Freds Project. Earth Island Inst. v. U.S. Forest Serv. (Earth Island II), 442 F.3d 1147, 1155 (9th Cir. 2006). [↑](#footnote-ref-44)
44. 44 Hawkings v. Comparet-Cassani, 251 F.3d 1230, 1239 (9th Cir. 2001); Brown v. Cal. Dep't of Transp., 321 F.3d 1217, 1221 (9th Cir. 2003). [↑](#footnote-ref-45)
45. 45 Administrative Procedure Act, 5 U.S.C§§551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2000). [↑](#footnote-ref-46)
46. 46 Id. § 706(2)(A). [↑](#footnote-ref-47)
47. 47 Marsh v. Or. Natural Res. Council, 490 U.S. 360, 378 (1989). [↑](#footnote-ref-48)
48. 48 See Cantrell v. Long Beach, 241 F.3d 674, 678-79 (9th Cir. 2001) (holding that although historic buildings with important bird habitat had already been torn down, defendants could still mitigate habitat damage); Neighbors of Cuddy Mountain v. Alexander, 303 F.3d 1059, 1066 (9th Cir. 2002) (holding that challenges brought under NEPA and NFMA were not moot even though logging was completed, for USFS could still undertake remedial measures such as bird species studies and future sales adjustments). [↑](#footnote-ref-49)
49. 49 Earth Island II, 442 F.3d 1147, 1159 (9th Cir. 2006). [↑](#footnote-ref-50)
50. 50 See Earth Island I, 351 F.3d 1291, 1297-98 (9th Cir. 2003) (holding that as an alternative to the "traditional" criteria, a court may grant a preliminary injunction if a plaintiff "demonstrates either a combination of probable success on the merits and the possibility of irreparable harm or that serious questions are raised and the balance of hardships tips sharply in [her or] his favor"). [↑](#footnote-ref-51)
51. 51 See ***Kern*** v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1066 (9th Cir. 2002) (noting that NEPA sets forth procedures crafted to ensure that agencies consider thoroughly the environmental consequences of their actions). [↑](#footnote-ref-52)
52. 52 A Management Indicator Species is a "bellwether, or class representative" for other species that have similar habitat needs or population characteristics. The National Forest Management Act requires the agency to "provide for the diversity of plant and animal communities," and the 2001 Framework proposes to use MIS as part of the effort to meet this requirement. 16 U.S.C. § 1604(g)(3)(B) (2000). [↑](#footnote-ref-53)
53. 53 Earth Island II, 442 F.3d at 1164-65. [↑](#footnote-ref-54)
54. 54 A 12 month review after a positive "90-day finding" is required by § 4(b)(3)(B) of the Endangered Species Act of 1973, codified at 16 U.S.C.§§1533 (b)(3)(B) (2000). Endangered and Threatened Wildlife and Plants: 90-Day Finding on a Petition To List the California Spotted Owl as Threatened or Endangered, 70 Fed. Reg. 35,607 (June 21, 2005). [↑](#footnote-ref-55)
55. 55 See Native Ecosystems Council v. U.S. Forest Serv., 418 F.3d 953, 965 (9th Cir. 2005) (stressing the need for a "full and fair discussion of the potential effects of the project"). [↑](#footnote-ref-56)
56. 56 Earth Island I, 351 F.3d 1291, 1301-02 (9th Cir. 2003). [↑](#footnote-ref-57)
57. 57 Under NFMA, USFS must develop resource management plans for all National Forests. 16 U.S.C. § 1604(a) (2000). [↑](#footnote-ref-58)
58. 58 Habitat analyses in place of population monitoring was appropriate where USFS had 1) consulted field studies showing how many acres of territory an individual species needed, 2) assumed the amount of acreage remained constant regardless of the actual size of the individual species' territory, and 3) examined the proposed alternatives to see how many acres of necessary habitat remained after the timber was harvested. Inland Empire Public Lands Council v. U. S. Forest Serv., 88 F.3d 754, 759 (9th Cir. 1996). [↑](#footnote-ref-59)
59. 59 Because Earth Island showed a strong likelihood of success on the merits, it needed only to show a possibility, as opposed to a probability, of irreparable injury if preliminary relief was not granted. [↑](#footnote-ref-60)
60. 60 See Kootenai Tribe v. Veneman, 313 F.3d 1094, 1125 (9th Cir. 2002) ("Where the purpose of the challenged action is to benefit the environment, the public interest must be taken into account in balancing the hardships."). [↑](#footnote-ref-61)
61. 61 Alaska National Interest Lands Conservation Act, 16 U.S.C. §§3101-3233 (2000). [↑](#footnote-ref-62)
62. 62 National Environmental Policy Act of 1969, 42 U.S.C.§§4321-4370e (2000). [↑](#footnote-ref-63)
63. 63 Administrative Procedure Act, 5 U.S.C. § 704 (2000). [↑](#footnote-ref-64)
64. 64 16 U.S.C. §§3101-3233, 3170(b). [↑](#footnote-ref-65)
65. 65 Kaiser v. Blue Cross of Cal., 347 F.3d 1107, 1111 (9th Cir. 2003). [↑](#footnote-ref-66)
66. 66 Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949). [↑](#footnote-ref-67)
67. 67 Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978). [↑](#footnote-ref-68)
68. 68 See, e.g., Fed. Trade Comm'n v. Standard ***Oil*** Co. (FTC v. Standard ***Oil***), 449 U.S. 232, 246 (1980) (applying the collateral order doctrine to determine the reviewability of an agency order). [↑](#footnote-ref-69)
69. 69 Hale v. Norton, 476 F.3d 694 (9th Cir. 2007). [↑](#footnote-ref-70)
70. 70 Id. [↑](#footnote-ref-71)
71. 71 National Environmental Policy Act of 1969, 42 U.S.C.§§4321-4370e (2000). [↑](#footnote-ref-72)
72. 72 Healthy Forests Restoration Act of 2003, 16 U.S.C.§§6501-6591 (2004 Supp.). [↑](#footnote-ref-73)
73. 73 Id. § 6512(a). [↑](#footnote-ref-74)
74. 74 Sw. Voter Registration Educ. Project v. Shelley, 344 F.3d 914, 918 (9th Cir. 2003). [↑](#footnote-ref-75)
75. 75 Walczak v. EPL Prolong, Inc., 198 F.3d 725, 730 (9th Cir. 1999). [↑](#footnote-ref-76)
76. 76 WildWest Inst. v. Bull, 472 F.3d 587, 590 (9th Cir. 2006). [↑](#footnote-ref-77)
77. 77 40 C.F.R. § 1502.2(f) (2006). [↑](#footnote-ref-78)
78. 78 WildWest Inst., 472 F.3d at 590. [↑](#footnote-ref-79)
79. 79 395 F.3d 1019, 1034-35 (9th Cir. 2005). [↑](#footnote-ref-80)
80. 80 The court distinguished the case at hand from Ecology Center, Inc. v. Austin on these grounds. 430 F.3d 1057, 1071 (9th Cir. 2005) (faulting the Forest Service for at least not consulting or relying upon on-site field testing and possibly not even conducting on-site verification prior to project authorization). [↑](#footnote-ref-81)
81. 81 Healthy Forests Restoration Act of 2003, 16 U.S.C. § 6516(c)(3) (2004 Supp.). [↑](#footnote-ref-82)
82. 82 Calpine Corporation is a nominal defendant. [↑](#footnote-ref-83)
83. 83 National Environmental Policy Act of 1969, 42 U.S.C.§§4321-43703 (2000). [↑](#footnote-ref-84)
84. 84 National Historic Preservation Act, 16 U.S.C. §§470-470x-6 (2000). [↑](#footnote-ref-85)
85. 85 National Forest Management Act of 1976, 16 U.S.C.§§472a, 5216, 1600, 1611-1614 (2000) (amending Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476). [↑](#footnote-ref-86)
86. 86 Administrative Procedure Act, 5 U.S.C.§§551-559, 701-706, 1305, 3344, 4301, 5335, 5362, 7521 (2000). [↑](#footnote-ref-87)
87. 87 Pit River Tribe v. Bureau of Land Mgmt., 306 F. Supp. 2d 929 (E.D. Cal. 2004). [↑](#footnote-ref-88)
88. 88 Geothermal Steam Act of 1970, 30 U.S.C.§§1001-1027 (2000). [↑](#footnote-ref-89)
89. 89 Id. § 1002. [↑](#footnote-ref-90)
90. 90 Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768, 773 (9th Cir. 2006). [↑](#footnote-ref-91)
91. 91 Id. [↑](#footnote-ref-92)
92. 92 Id. [↑](#footnote-ref-93)
93. 93 Id. [↑](#footnote-ref-94)
94. 94 American Indian Religious Freedom Act, 42 U.S.C.§§1996, 1996a (2000). [↑](#footnote-ref-95)
95. 95 Pit River Tribe, 469 F.3d at 774. [↑](#footnote-ref-96)
96. 96 Id. [↑](#footnote-ref-97)
97. 97 Id. [↑](#footnote-ref-98)
98. 98 Id. at 775. [↑](#footnote-ref-99)
99. 99 Id. at 786 (emphasis omitted). [↑](#footnote-ref-100)
100. 100 Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996). [↑](#footnote-ref-101)
101. 101 Pit River Tribe, 469 F.3d at 778. [↑](#footnote-ref-102)
102. 102 Pit River Tribe v. Bureau of Land Mgmt., 306 F. Supp. 2d 929 (E.D. Cal. 2004). [↑](#footnote-ref-103)
103. 103 Westland Water Dist. v. U.S. Dep't of Interior, 376 F.3d 853, 865 (9th Cir. 2004). [↑](#footnote-ref-104)
104. 104 Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2000). [↑](#footnote-ref-105)
105. 105 See Energy Policy Act of 2005, Pub. L. No. 109-58,§§231(1), (2), 119 Stat. 594, repealing 30 U.S.C. § 1005(g). [↑](#footnote-ref-106)
106. 106 See Bennett v. Spear, 520 U.S. 154, 167 (1997). [↑](#footnote-ref-107)
107. 107 Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768, 779 (9th Cir. 2006). [↑](#footnote-ref-108)
108. 108 Id. at 779 (citing Cantrell v. City of Long Beach, 241 F.3d 674, 682 (9th Cir. 2001)). [↑](#footnote-ref-109)
109. 109 30 U.S.C. § 1005(g)(1) (2000) (repealed by Pub. L. No. 109-58, Aug. 8, 2005). [↑](#footnote-ref-110)
110. 110 Energy Policy Act of 2005, Pub. L. No. 109-58 § 231 (to be codified at 30 U.S.C. § 1005). [↑](#footnote-ref-111)
111. 111 Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768, 780 (9th Cir. 2006). [↑](#footnote-ref-112)
112. 112 See Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 768 (2004). [↑](#footnote-ref-113)
113. 113 Landgraf v. USI Film Products, 511 U.S. 244 (1994). [↑](#footnote-ref-114)
114. 114 Id. at 245. [↑](#footnote-ref-115)
115. 115 Id. at 280. [↑](#footnote-ref-116)
116. 116 Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976). [↑](#footnote-ref-117)
117. 117 Conner v. Burford, 848 F.2d 1441, 1446 (9th Cir. 1988). [↑](#footnote-ref-118)
118. 118 Id. at 1451. [↑](#footnote-ref-119)
119. 119 Id. [↑](#footnote-ref-120)
120. 120 Id. at 1443-44. [↑](#footnote-ref-121)
121. 121 Id. at 1451 (citation omitted). [↑](#footnote-ref-122)
122. 122 Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768, 782 (9th Cir. 2006) (citing Friends of Se.'s Future v. Morrison, 153 F.3d 1059, 1063-64 (9th Cir. 1998)). [↑](#footnote-ref-123)
123. 123 Id. at 782-83. [↑](#footnote-ref-124)
124. 124 Id. at 783. [↑](#footnote-ref-125)
125. 125 Id. [↑](#footnote-ref-126)
126. 126 579 F.2d 1162 (9th Cir. 1978). [↑](#footnote-ref-127)
127. 127 Id. at 1168. [↑](#footnote-ref-128)
128. 128 Id. at 1167. [↑](#footnote-ref-129)
129. 129 Nat'l Wildlife Fed'n v. Espy, 45 F.3d 1337, 1344 (9th Cir. 1995). [↑](#footnote-ref-130)
130. 130 Conner, 848 F.2d at 1446 (quoting Sierra Club v. Peterson, 717 F.2d 1409, 1414 (D.C. Cir. 1983)). [↑](#footnote-ref-131)
131. 131 40 C.F.R. § 1502.5 (2006). [↑](#footnote-ref-132)
132. 132 840 F.2d 714 (9th Cir. 1998). [↑](#footnote-ref-133)
133. 133 Id. at 718-19. [↑](#footnote-ref-134)
134. 134 214 F.3d 1135 (9th Cir. 2000). [↑](#footnote-ref-135)
135. 135 Id. at 1143. [↑](#footnote-ref-136)
136. 136 Pit River Tribe v. Bureau of Land Mgmt., 469 F.3d 768, 787 (9th Cir. 2006). [↑](#footnote-ref-137)
137. 137 See Pit River Tribe, 306 F. Supp. 2d at 945-46 and n.10 (explaining that the extension of the leases was exempt from NEPA and NHPA). [↑](#footnote-ref-138)
138. 138 United States v. 0.95 Acres of Land, 994 F.2d 696, 698 (9th Cir. 1993). [↑](#footnote-ref-139)
139. 139 Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 806 (9th Cir. 1999). [↑](#footnote-ref-140)
140. 140 36 C.F.R. § 800.1(c) (2005). [↑](#footnote-ref-141)
141. 141 Inter Tribal Council of Ariz., Inc. v. Babbit, 51 F.3d 199, 203 (9th Cir. 1995). [↑](#footnote-ref-142)
142. 142 Morango Band of Mission Indians v. Fed. Aviation Admin. (Morango Band of Mission Indians v. FAA), 161 F.3d 569, 574 (9th Cir. 1998). [↑](#footnote-ref-143)
143. 143 Pit River Tribe v. Bureau of Land Mgmt., 469 F.3d 768, 788 (9th Cir. 2006). [↑](#footnote-ref-144)
144. 144 National Environmental Policy Act of 1969, 42 U.S.C.§§4321-4370e (2006). [↑](#footnote-ref-145)
145. 145 Notice of Intent (NOI) to Prepare a Programmatic Environmental Impact Statement (PEIS) for Implementation of the Army Transformation Campaign Plan (ATCP), 65 Fed. Reg. 78,476 (Dec. 15, 2000). [↑](#footnote-ref-146)
146. 146 Dep't of the Army, Public Notice, USA Today, Dec. 19, 2000 (stating, "THE DEPARTMENT OF THE ARMY SEEKS PUBLIC INPUT FOR PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT FOR IMPLEMENTATION OF THE ARMY TRANSFORMATION CAMPAIGN PLAN," indicating that the Army is seeking public comment to determine the "appropriate scope of its Programmatic Environmental Impact Statement," and summarizing the alternatives under consideration as "no-action," "partial implementation of the TCP," and "full implementation of the TCP"). [↑](#footnote-ref-147)
147. 147 Dep't of the Army, Notice of Availability of the Draft PEIS for Implementation of Army Transformation, USA Today, Oct. 26, 2001. [↑](#footnote-ref-148)
148. 148 Environmental Impact Statements; Notice of Availability, 66 Fed. Reg. 54,241 (Oct. 26, 2001). [↑](#footnote-ref-149)
149. 149 See 40 C.F.R. § 1502.20 (2006) (""Tiering' refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses … incorporating by reference the general discussions and concentrating solely on the issues specific to statement subsequently prepared."). [↑](#footnote-ref-150)
150. 150 See Dept of the Army, Final Site-Specific Environmental Impact Statement, Transformation of the 2nd Brigade, 25th Infantry Division (Light) to a Stryker Brigade Combat Team in Hawaii at 1-8, 1-9 (May 2004). [↑](#footnote-ref-151)
151. 151 See Dept of the army, Record of Decision, Transformation of the 2d Brigade, 25th Infantry Division (Light) to a Stryker Brigade Combat Team in Hawaii at 7-8 (July 2004) (providing that the SEIS considered no-action, reduced land acquisition, and proposed action alternatives). [↑](#footnote-ref-152)
152. 152 See "Ilio"ulaokalani Coal. v. Rumsfeld, 369 F. Supp. 2d 1246, 1249-54 (D. Haw. 2005). [↑](#footnote-ref-153)
153. 153 See id. [↑](#footnote-ref-154)
154. 154 See Westlands Water Dist. v. U.S. Dep't of Interior, 376 F.3d 853, 865 (9th Cir. 2004). [↑](#footnote-ref-155)
155. 155 See Envtl. Coal. of Ojai v. Brown, 72 F.3d 1411, 1414 (9th Cir. 1995). [↑](#footnote-ref-156)
156. 156 Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2006). [↑](#footnote-ref-157)
157. 157 See California v. Block, 690 F.2d 753, 761 (9th Cir. 1982) (providing that the "rule of reason" review standard "inquires whether an EIS contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences" (internal quotation marks and citation omitted)). [↑](#footnote-ref-158)
158. 158 Lands Council v. Powell, 395 F.3d 1019, 1026 n.5 (9th Cir. 2005). See also City of Carmel-By-The-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1150-51 (9th Cir. 1997) (citing Block, 690 F.2d at 761) (providing "We make a pragmatic judgment about whether the [Environmental Impact Statement's] form, content and preparation foster both informed decision-making and informed public participation." (internal quotation marks omitted)). [↑](#footnote-ref-159)
159. 159 City of Carmel-By-The-Sea, 123 F.3d at 1151. [↑](#footnote-ref-160)
160. 160 See Kunaknana v. Clark, 742 F.2d 1145, 1148 (9th Cir. 1984) (explaining that the court has not adopted "a broad rule which would require participation in agency proceedings as a condition precedent to seeking judicial review of an agency decision"). [↑](#footnote-ref-161)
161. 161Ilio"ulaokalani Coal. v. Rumsfeld, 464 F.3d 1083, 1092 (9th Cir. 2006) (quoting Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 765 (2004) (providing "the agency bears the primary responsibility to ensure that it complies with NEPA, and an EA's or EIS' flaws might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action." (internal citation omitted)). [↑](#footnote-ref-162)
162. 162 See Friends of Clearwater v. Dombeck, 222 F.3d 552, 558-59 (9th Cir. 2000) (holding an EIS insufficient where agency was independently aware of issues of concern to plaintiffs). [↑](#footnote-ref-163)
163. 163 See Dep't of the Army Envtl. Law Div., Internal Army Comments on the Preliminary Draft PEIS for Army Transformation (May 7, 2001), at 1-6 (Comments of Paul Martin, NEPA Compliance Coordinator for the Army's Envtl. Ctr., Comments of Timothy Julius, Office of the Dir. of Envtl. Programs), AR 0004465-66, 0004476-79; Email from Scott Farley, AR 0004486-88; After Action Report at 1-6, AR 0088100-05 [hereinafter Comments on Draft PEIS]. [↑](#footnote-ref-164)
164. 164 See Friends of Se.'s Future v. Morrison, 153 F.3d 1059, 1065 (9th Cir. 1998) (providing "An EIS must describe and analyze alternatives to the proposed action… . The agency must look at every reasonable alternative within the range dictated by the nature and scope of the proposal. The existence of reasonable but unexamined alternatives renders an EIS inadequate." (internal citations and quotation marks omitted)); see also 40 C.F.R. § 1502.14 (stating that consideration of alternatives is the "heart of the environmental impact statement."). [↑](#footnote-ref-165)
165. 165 See California v. Block, 690 F.2d 753, 761 (9th Cir. 1982) (providing that after a programmatic EIS is completed "site-specific impacts need not be fully evaluated until a "critical decision' has been made to act on site development. This threshold is reached when, as a practical matter, the agency proposes to make an "irreversible and irretrievable commitment of the availability of resources' to a project at a specific site." (internal citations omitted)). [↑](#footnote-ref-166)
166. 166Ilio"ulaokalani, 464 F.3d at 1096 (citing Block, 690 F.2d at 762-63). [↑](#footnote-ref-167)
167. 167 See Comments on Draft PEIS at 4, AR 0004465 ("Interim Force considerations are ripe for reasonably detailed analysis… . Interim Force development is an imminent proposal requiring a near term decision and commitment of Army resources … . Paragraph screams that the Army plans to make a Major [sic] resource allocation decision on the Interim Force without consideration of alternatives."). [↑](#footnote-ref-168)
168. 168 See 40 C.F.R. § 1502.20 (2006) (providing that tiered analysis is "encouraged … to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review."); see also id. § 1508.28(a) (providing that tiering is appropriate where agency action involves shifting from "a program, plan, or policy environmental impact statement to … a site-specific statement or analysis."). [↑](#footnote-ref-169)
169. 169Ilio"ulaokalani, 464 F.3d at 1097. [↑](#footnote-ref-170)
170. 170 See Nw. Coal. for Alternatives to Pesticides v. Lyng, 844 F.2d 588, 592 (9th Cir. 1988) (providing "it is the scope of the program that influences any determination of what alternatives are viable and reasonable."). [↑](#footnote-ref-171)
171. 171 See City of Carmel-By-The-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1155 (9th Cir. 1997) (providing that while it is within an agency's discretion to define a project's need and purpose, an agency may not "define its objectives in unreasonably narrow terms."). [↑](#footnote-ref-172)
172. 172 See Final PEIS at 1-2, AR 0003865 (providing that the Army's mission is "to enable the Army to achieve the force characteristics articulated in the Army Vision in the most timely and efficient manner possible and without compromising readiness and responsiveness… . Transformation is needed to address the changing circumstances of the 21st Century."). [↑](#footnote-ref-173)
173. 173 See Methow Valley Citizens Council v. Reg'l Forester, 833 F.2d 810, 815 (9th Cir. 1987) (providing that alternate locations must be considered when an agency's purpose "is not, by its own terms, tied to a specific parcel of land."). [↑](#footnote-ref-174)
174. 174 See City of Alexandria v. Slater, 198 F.3d 862, 868 (D.C. Cir. 1999) (providing "when the proposed action is an integral part of a coordinated plan to deal with a broad problem, the range of alternatives that must be evaluated is broadened." (quoting Natural Res. Def. Council v. Morton, 458 F.2d 827, 835 (D.C. Cir. 1972) (internal quotation marks omitted)). [↑](#footnote-ref-175)
175. 175 See After Action Report at 1, 3, AR 0088100, 0088102 (indicating that Army personnel and Hawaiians alike were concerned about the lack of justification for not analyzing alternatives to transforming the Brigade in Hawaii); see also id. at 5-6, AR 00088104-05 ("The PEIS leaves us short on alternatives. The only alternatives we have are no action versus action. The [purpose and need] statements are crafted so tightly that we may be restricting ourselves too much."); id. at 3 (providing "A major issue that surfaced during group discussion was the fact that the PEIS does not contain specific language about why each of the five sites was selected. It would have been helpful … so that each site could refer to the PEIS when queried about reasons for selection."); Comments on Draft PEIS at 1, AR 0004478 (indicating that the transformation's framing "has foreclosed any rational consideration of alternatives … to meet the stated purpose and need."); AR 0004485 (providing that the "EIS is woefully inadequate: The alternatives are meaningless. Where is the "analysis' of installations as initiated in the NOI? … The decision provides no starting point or analysis that would be useful to installations. Based on this document, the Army is forcing the installations to individually justify transformation."). [↑](#footnote-ref-176)
176. 176Ilio"ulaokalani Coal. v. Rumsfeld 464, F.3d 1083, 1100 (9th Cir. 2006). [↑](#footnote-ref-177)
177. 177 See Final SEIS at 1-5, AR 0051576 (providing "There are two other [transformed brigades] on the Pacific coast of the United States (Alaska and Washington) to support deployment to the critically important Pacific Rim … ."). [↑](#footnote-ref-178)
178. 178 See HQDA, Training Directorate, Office of the Dep. Chief of Staff for Operations and Plans, Installation Training Capacity (ITC) Phase 1 Study Report (Dec. 31, 1997), at 11, AR 0002886 (providing that "training areas on Oahu, Hawaii are unique in the Army's training land inventory. They are the only mountainous jungle setting."). [↑](#footnote-ref-179)
179. 179 See Final SEIS at 2-33, AR 0051318 (providing that Stryker combat vehicles have eight wheels, weigh 20 tons, are 23 feet long, and 9 feet wide). [↑](#footnote-ref-180)
180. 180 See Final SEIS at 7-15, AR 00551957 ("KLOA can support small infantry unit maneuvers and helicopter. The remaining land is considered unsuitable for maneuver training, but can support mountain and jungle warfare training. In these areas, troop deployment is limited to single file, small unit movement on ridgelines."); id. at 2-37, AR 0051322 (indicating that no ground within KLOA is appropriate for training involving Stryker vehicles and that such vehicles are only suitable within KLOA on a road when in transit to other places.). [↑](#footnote-ref-181)
181. 181 See Friends of Se.'s Future v. Morrison, 153 F.3d 1059, 1065 (9th Cir. 1998) (providing "An EIS must describe and analyze alternatives to the proposed action… . The agency must look at every reasonable alternative within the range dictated by the nature and scope of the proposal. The existence of reasonable but unexamined alternatives renders an EIS inadequate." (internal citations omitted)). [↑](#footnote-ref-182)
182. 182 National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§4321-4370e (2000). [↑](#footnote-ref-183)
183. 183 Federal Water Pollution Control Act (CWA), 33 U.S.C.§§1251-1387 (2000). [↑](#footnote-ref-184)
184. 184 Administrative Procedures Act (APA), 5 U.S.C.§§551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5362, 7521 (2000). [↑](#footnote-ref-185)
185. 185 Great Basin Mine Watch v. Hankins, 456 F.3d 955, 961 (9th Cir. 2006) [hereinafter Great Basin]. [↑](#footnote-ref-186)
186. 186 Id. [↑](#footnote-ref-187)
187. 187 Id. at 961-62 (citing 5 U.S.C. § 706(2)(A) (2000)). [↑](#footnote-ref-188)
188. 188 Id. at 962 (citing Sw. Ctr. for Biological Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1447 (9th Cir. 1996)). [↑](#footnote-ref-189)
189. 189 Great Basin, 456 F.3d at 962. [↑](#footnote-ref-190)
190. 190 Id. at 963. [↑](#footnote-ref-191)
191. 191 PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology, 511 U.S. 700, 707 (1994) [hereinafter PUD]. [↑](#footnote-ref-192)
192. 192 Great Basin, 456 F.3d at 962. [↑](#footnote-ref-193)
193. 193 511 U.S. at 719. [↑](#footnote-ref-194)
194. 194 Great Basin, 456 F.3d at 963 (emphasis in original). [↑](#footnote-ref-195)
195. 195 The Ninth Circuit cited to North Carolina v. FERC, 112 F.3d 1175 (D.C. Cir. 1997), Save Our Community v. EPA, 971 F.2d 1155 (5th Cir. 1992), and Colo. Wild, Inc. v. U.S. Forest Serv., 122 F. Supp. 2d 1190 (D. Colo. 2000). [↑](#footnote-ref-196)
196. 196 126 S. Ct. 1843 (2006). [↑](#footnote-ref-197)
197. 197 Great Basin, 456 F.3d at 964. [↑](#footnote-ref-198)
198. 198 Id. [↑](#footnote-ref-199)
199. 199 Great Basin also argued that the Federal Land Policy and Management Act of 1976 (the Act), 43 U.S.C§§1701-1785 (2000), expands the requirements of the CWA's anti-degradation provision. In the pertinent part, the Act requires the government to "take any action necessary to prevent the unnecessary or undue degradation of the lands," id. at § 1732(b), but it also provides that "nothing in this Act shall be construed as … expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resources development or control." Pub. L. No. 94-579, § 701, 90 Stat. 2743, 2786 (1976). The Ninth Circuit looked at the plain language of the Act and held that it does not expand CWA requirements. [↑](#footnote-ref-200)
200. 200 Great Basin, 456 F.3d at 965 (quoting Native Ecosystems Council v. Dombeck, 304 F.3d 886, 899 (9th Cir. 2002)). [↑](#footnote-ref-201)
201. 201 Great Basin, 456 F.3d at 966. [↑](#footnote-ref-202)
202. 202 President Calvin Coolidge created Public Water Reserve No. 107 by executive order in 1926. It provides that unsurveyed or vacant, unappropriated and unreserved public lands within a quarter mile of a "spring or waterhole" are "reserved for public use." Exec. Order of April 17, 1926, reprinted in 51 Pub. Lands Dec. 457, 457 (1926). [↑](#footnote-ref-203)
203. 203 Newmont intervened in the appeal and argued that Great Basin lacked standing to assert a claim under PWR, because Great Basin's interests did not fall within the "zone of interest" that PWR was meant to protect. Great Basin, 456 F.3d at 966. The Ninth Circuit explained that the zone of interest test only requires that "the interest sought to be protected by the complainant is arguably within the zone of interest." Id. at 967 (quoting Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 552 U.S. 479, 492 (1998) (internal quotation omitted) (emphasis in original)). Great Basin had satisfied this test by presenting evidence that its members utilized the springs and waterholes at issue. Id. [↑](#footnote-ref-204)
204. 204 Wetlands Action Network v. U.S. Army Corps of Eng'rs, 222 F.3d 1105, 1118 (9th Cir. 2000) (internal quotations and citations omitted). [↑](#footnote-ref-205)
205. 205 Great Basin, 456 F.3d at 969. [↑](#footnote-ref-206)
206. 206 Id. (citing Native Ecosystems Council, 304 F.3d 886, 894 (9th Cir. 2002)). [↑](#footnote-ref-207)
207. 207 Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt., 387 F.3d 989, 993 (9th Cir. 2004) (internal quotations and citations omitted). [↑](#footnote-ref-208)
208. 208 Lands Council v. Powell, 395 F.3d 1019, 1028 (9th Cir. 2005) (as amended). [↑](#footnote-ref-209)
209. 209 Klamath-Siskiyou, 387 F.3d at 994. [↑](#footnote-ref-210)
210. 210 Great Basin, 456 F.3d at 973. [↑](#footnote-ref-211)
211. 211 Id. at 973-74. [↑](#footnote-ref-212)
212. 212 43 C.F.R. § 3809.552(a) (2000). [↑](#footnote-ref-213)
213. 213 Great Basin, 456 F.3d at 974. [↑](#footnote-ref-214)
214. 214 Id. [↑](#footnote-ref-215)
215. 215 43 C.F.R. § 3809.574 (2000) (stating that the Bureau "will not accept any new corporate guarantees or increases to corporate guarantees."). [↑](#footnote-ref-216)
216. 216 See Lands Council, 395 F.3d at 1030:

     In limited circumstances, district courts are permitted to admit extra-record evidence: (1) if admission is necessary to determine whether the agency has considered all relevant factors and has explained its decision, (2) if the agency has relied on documents not in the record, (3) when supplementing the record is necessary to explain technical terms or complex subject matter, or (4) when plaintiffs make a showing of agency bad faith.

     Id. [↑](#footnote-ref-217)
217. 217 Great Basin, 456 F.3d at 977. [↑](#footnote-ref-218)
218. 218 National Environmental Policy Act of 1969, 42 U.S.C.§§4321-4370e (2000). [↑](#footnote-ref-219)
219. 219 Endangered Species Act of 1973, 16 U.S.C.§§1531-1544 (2000). [↑](#footnote-ref-220)
220. 220 42 U.S.C. § 6508a (2000). [↑](#footnote-ref-221)
221. 221 N. Alaska Envtl. Ctr. v. Norton, 361 F. Supp. 2d 1069, 1085 (D. Alaska 2005). [↑](#footnote-ref-222)
222. 222 Natural Res. Def. Council v. U.S. Dep't of Interior, 113 F.3d 1121, 1123 (9th Cir. 1997). [↑](#footnote-ref-223)
223. 223 Administrative Procedure Act, 5 U.S.C.§§551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5362, 7521 (2000). [↑](#footnote-ref-224)
224. 224 Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1211 (9th Cir. 1998) (quoting the APA, 5 U.S.C. § 706(2)(A) (2000)). [↑](#footnote-ref-225)
225. 225 Save the Yaak Comm. v. Block, 840 F.2d 714, 717 (9th Cir. 1988) (quoting Jones v. Gorden, 792 F.2d 821, 828 (9th Cir. 1986)). [↑](#footnote-ref-226)
226. 226 Conner v. Burford, 848 F.2d 1441, 1446 (9th Cir. 1988). [↑](#footnote-ref-227)
227. 227 N. Alaska Envtl. Ctr. v. Kempthorne, 457 F.3d 969, 972 (9th Cir. 2006). [↑](#footnote-ref-228)
228. 228 848 F.2d 1441 (9th Cir. 1988). [↑](#footnote-ref-229)
229. 229 See N. Slope Borough v. Andrus, 642 F.2d 589, 605-06 (1980). [↑](#footnote-ref-230)
230. 230 See 43 C.F.R. § 3162.3-1(c) (2006). [↑](#footnote-ref-231)
231. 231 See National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C)(iii) (2000) (mandating that all federal agencies provide a detailed alternatives analysis in every recommendation or report on proposals for legislation or major federal actions). [↑](#footnote-ref-232)
232. 232 The Audubon Society proposed the Audubon Alternative in a comment to the draft EIS, recommending that BLM not offer leases on 35% of the high ***oil*** potential area. [↑](#footnote-ref-233)
233. 233 Headwaters, Inc. v. Bureau of Land Mgmt., 914 F.2d 1174, 1181 (9th Cir. 1990). [↑](#footnote-ref-234)
234. 234 Id. at 1180-81 (citing California v. Block, 690 F.2d 753, 767 (9th Cir. 1982)). [↑](#footnote-ref-235)
235. 235 See 40 C.F.R. § 1502.14(a) (2006) (requiring that an agency explain its reasoning for eliminating an alternative). [↑](#footnote-ref-236)
236. 236 Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 352 (1989). [↑](#footnote-ref-237)
237. 237 See 40 C.F.R. § 1508.25(a)(2) (2006) (requiring that a FEIS consider "cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement"). [↑](#footnote-ref-238)
238. 238 Lands Council v. Powell, 379 F.3d 738, 746 (9th Cir. 2004) rev'd on other grounds, 395 F.3d 1019 (9th Cir. 2005). [↑](#footnote-ref-239)
239. 239 Tenakee Springs v. Clough, 915 F.2d 1308, 1313 (9th Cir. 1990); Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 812 (9th Cir. 1999). [↑](#footnote-ref-240)
240. 240 See Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1357-58 (9th Cir. 1994) ("having persuaded the district court that it understands its duty to follow NEPA in reviewing future site-specific programs, judicial estoppel will preclude the Forest Service from later arguing that it has no further duty to consider the cumulative impact of site specific programs."). [↑](#footnote-ref-241)
241. 241 Conner v. Burford, 848 F.2d 1441, 1451-52 (9th Cir. 1988); see also 16 U.S.C. § 1536(a)(2) (2000). [↑](#footnote-ref-242)
242. 242 16 U.S.C. § 1536(a)(2) (2000). [↑](#footnote-ref-243)
243. 243 See Conner, 848 F.2d at 1454 (providing that the ESA requires agencies to "make projections, based on potential locations and levels [of] ***oil*** and gas activity, of the impact of production on protected species"). [↑](#footnote-ref-244)
244. 244 See 50 C.F.R. § 402.16(b) (2006). [↑](#footnote-ref-245)
245. 245 National Environmental Policy Act of 1969, 42 U.S.C.§§4321-4370e (2000). [↑](#footnote-ref-246)
246. 246 National Atomic Energy Act of 1954, 42 U.S.C.§§2011-2297g (2000). [↑](#footnote-ref-247)
247. 247 Administrative Procedure Act, 5 U.S.C.§§551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5362, 7521 (2000). [↑](#footnote-ref-248)
248. 248 See Dept. of Transp. v. Pub. Citizen, 541 U.S. 752, 756 (2004). [↑](#footnote-ref-249)
249. 249 See id. at 757-58 (citing 40 C.F.R.§§1501.4(e) and 40 C.F.R.§§1508.13 (2006)). [↑](#footnote-ref-250)
250. 250 See National Atomic Energy Act of 1954, 42 U.S.C. § 2232(a) (2000). [↑](#footnote-ref-251)
251. 251 See 42 U.S.C. § 2239(a) (2000); 10 C.F.R. §§2.308- 2.348 (2006); 5 U.S.C. §§551-706 (2000). [↑](#footnote-ref-252)
252. 252 See 10 C.F.R. § 2.321 (2006). [↑](#footnote-ref-253)
253. 253 See 10 C.F.R. § 2.341 (2006). [↑](#footnote-ref-254)
254. 254 See id. § 2.341. [↑](#footnote-ref-255)
255. 255 See id. § 2.341(c)(1). [↑](#footnote-ref-256)
256. 256 See id. § 2.344. [↑](#footnote-ref-257)
257. 257 See 28 U.S.C. § 2344 (2000). [↑](#footnote-ref-258)
258. 258 See 10 C.F.R. § 2.309(a) (2006). [↑](#footnote-ref-259)
259. 259 Id. Admissible contentions must:

     Be set forth with particularity, … provide a specific statement of the disputed issue of law or fact, … provide the basis for the contention, … demonstrate that the issue is within the scope of the proceeding, … demonstrate that the issue is material to the finding the NRC must make, … provide supporting references and expert opinions, … and provide sufficient information to show the existence of a genuine issue of law or fact.

     10 C.F.R. § 2.309(f)(l) (2006). [↑](#footnote-ref-260)
260. 260 Licensing Bd. Proceeding, LBP-02-23, 56 N.R.C. 413 (2002). [↑](#footnote-ref-261)
261. 261 Id. [↑](#footnote-ref-262)
262. 262 Id. at 448. [↑](#footnote-ref-263)
263. 263 Order and Memorandum, CLI-03-1, 57 N.R.C. 1 (2002). [↑](#footnote-ref-264)
264. 264 The four cases NRC relied on are: Private Fuel Storage, L.L.C., CLI-02-25, 56 N.R.C. 340 (2002), Duke Cogema Stone & Webster, CLI-02-24, 56 N.R.C. 335 (2002), Dominion Nuclear Conn., Inc., CLI-02-27, 56 N.R.C. 367 (2002), and Duke Energy Corp., CLI-02-26, 56 N.R.C. 358 (2002). [↑](#footnote-ref-265)
265. 265 57 N.R.C. at 7. [↑](#footnote-ref-266)
266. 266 See 10 C.F.R. § 2.335 (2006) (prohibiting challenges to NRC rules or regulations involving initial and renewal licensing determinations). [↑](#footnote-ref-267)
267. 267 Memorandum and Order, CLI-02-23, 56 N.R.C. 230 (2002); see 10 C.F.R. § 2.323 (2006) (allowing generally for "motions"). [↑](#footnote-ref-268)
268. 268 Memorandum and Order, CLI-03-12, 58 N.R.C. 185 (2003). [↑](#footnote-ref-269)
269. 269 28 U.S.C. § 2344 (2000). [↑](#footnote-ref-270)
270. 270 San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n, 449 F.3d 1016, 1024 (9th Cir. 2006). [↑](#footnote-ref-271)
271. 271 See 42 U.S.C. § 2239 (2000) (stating that the AEA confers the right to a public hearing "upon the request of any person whose interest may be affected" by a licensing decision); 10 C.F.R. § 2.309 (2006) (stating that NRC (formerly AEC) has the "power to make, promulgate, issue, rescind, and amend such rules and regulations as may be necessary to carry out the purposes" of the AEA); 12 U.S.C. § 2201(p) (2000) (setting out the procedures required of NRC and petitioners when filing and deciding petitions). [↑](#footnote-ref-272)
272. 272 See 10 C.F.R. § 2.714(i) (2006). [↑](#footnote-ref-273)
273. 273 862 F.2d 222 (9th Cir. 1988). [↑](#footnote-ref-274)
274. 274 See id. at 228. [↑](#footnote-ref-275)
275. 275 Union of Concerned Scientists v. Nuclear Regulatory Comm'n, 735 F.2d 1437 (D.C. Cir. 1984). [↑](#footnote-ref-276)
276. 276 See id. at 1451. [↑](#footnote-ref-277)
277. 277 813 F.2d 1006, 1014 (9th Cir. 1987). [↑](#footnote-ref-278)
278. 278 See Administrative Procedure Act, 5 U.S.C. § 553(b), (c) (2000). [↑](#footnote-ref-279)
279. 279 See also Ala. Wilderness Recreation & Tourism Ass'n v. Morrison, 67 F.3d 723, 727 (9th Cir. 1995) (noting that while purely legal challenges are rare, the court has to address those challenges); cf. Greenpeace Action v. Franklin, 14 F.3d 1324, 1331 (9th Cir. 1993) (discussing a challenge to an EA based on factual, not legal issues). [↑](#footnote-ref-280)
280. 280 See Sec. & Exch. Comm'n v. Chenery (SEC v. Chenery), 332 U.S. 194, 199-203 (1947) (recognizing that an agency has the power to determine whether to make a legal norm by rule, individual or litigation). [↑](#footnote-ref-281)
281. 281 See Ala. Wilderness Recreation, 67 F.3d 723, 727 (9th Cir. 1995) (stating that reviewing a legal issue for reasonableness makes sense considering the high level of deference given to an agency in factual determinations); Ka Makani "O Kohala Ohana, Inc. v. Water Supply, 295 F.3d 955, 959 n.3 (9th Cir. 2002) (stating that when the case concerned mainly legal issues, the court determined that the reasonableness standard was the appropriate standard of review). [↑](#footnote-ref-282)
282. 282 56 N.R.C. 340 (2000). [↑](#footnote-ref-283)
283. 283 Id. at 345. [↑](#footnote-ref-284)
284. 284 Id. at 347. [↑](#footnote-ref-285)
285. 285 San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n, 449 F.3d 1016, 1028 (9th Cir. 2006) (citing Private Fuel Storage L.L.C., 56 N.R.C. at 348). [↑](#footnote-ref-286)
286. 286 National Environmental Policy Act of 1969, 42 U.S.C. § 4332(1)(c)(i) (2000). [↑](#footnote-ref-287)
287. 287 460 U.S. 766 (1983). [↑](#footnote-ref-288)
288. 288 Id. at 774. [↑](#footnote-ref-289)
289. 289 Id. at 772. [↑](#footnote-ref-290)
290. 290 855 F.2d 1380 (9th Cir. 1988). [↑](#footnote-ref-291)
291. 291 Id. at 1368. [↑](#footnote-ref-292)
292. 292 San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n, 449 F.3d 1016, 1029 (9th Cir. 2006). [↑](#footnote-ref-293)
293. 293 Metro. Edison Co., 460 U.S. at 775 n.9. [↑](#footnote-ref-294)
294. 294 NoGwen, 855 F.2d at 1386. [↑](#footnote-ref-295)
295. 295 621 F.2d 1017 (9th Cir. 1980). [↑](#footnote-ref-296)
296. 296 Id. at 1026. [↑](#footnote-ref-297)
297. 297 NoGwen, 855 F.2d at 1386. [↑](#footnote-ref-298)
298. 298 Private Fuel Storage, L.L.C., 56 N.R.C. 340, 349 (2000). [↑](#footnote-ref-299)
299. 299 Id. at 343. [↑](#footnote-ref-300)
300. 300 Id. at 350. [↑](#footnote-ref-301)
301. 301 Proposed Policy Statement on Severe Accidents and Related Views on Nuclear Reactor Regulation, 48 Fed. Reg. 16,014, 16,020 (Apr. 13, 1983). [↑](#footnote-ref-302)
302. 302 See Limerick Ecology Action v. Nuclear Regulatory Comm'n, 869 F.2d 719, 754 (3rd Cir. 1989) (J. Scirica, dissenting) (stating that there is no statute, regulation or policy statement that allows the NRC to dismiss a risk that is unquantifiable). [↑](#footnote-ref-303)
303. 303 See 40 C.F.R. § 1502.22(b)(3)-(4) (2006); see also Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 355 (1989) (holding that the amended regulations eliminated the worst-case analysis requirement from NEPA). [↑](#footnote-ref-304)
304. 304 See 40 C.F.R. § 1502.22(b)(4) (2006). [↑](#footnote-ref-305)
305. 305 Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026-01 (Mar. 23, 1981). [↑](#footnote-ref-306)
306. 306 454 U.S. 139 (1981) (requiring the Navy to comply with NEPA when the sensitivity of the information did not allow for the publication or adjudication of the NEPA results). [↑](#footnote-ref-307)
307. 307 San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n, 449 F.3d 1016, 1034 (9th Cir. 2006). [↑](#footnote-ref-308)
308. 308 Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 768 (2004). [↑](#footnote-ref-309)
309. 309 NoGwen Alliance v. Aldridge, 855 F.2d 1380, 1384 (9th Cir. 1988) (internal quotations omitted, citation omitted). [↑](#footnote-ref-310)
310. 310 National Environmental Policy Act of 1969, 42 U.S.C.§§4321-4370e (2000). [↑](#footnote-ref-311)
311. 311 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-312)
312. 312 Id. § 1604(g)(3)(B). [↑](#footnote-ref-313)
313. 313 Envtl. Prot. Info. Ctr. v. U.S. Forest Serv. (EPIC), 451 F.3d 1005, 1008 (9th Cir. 2006). [↑](#footnote-ref-314)
314. 314 Such consultations are required under Section 7 of the Endangered Species Act. Endangered Species Act of 1973, 16 U.S.C. § 1536 (2000). [↑](#footnote-ref-315)
315. 315 Native Ecosystems Council v. U.S. Forest Serv. (Native Ecosystems), 428 F.3d 1233, 1238 (9th Cir. 2005). [↑](#footnote-ref-316)
316. 316 Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2000). [↑](#footnote-ref-317)
317. 317 EPIC, 451 F.3d at 1009 (internal quotations and citations omitted). [↑](#footnote-ref-318)
318. 318 NEPA requires an EIS for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (2000). [↑](#footnote-ref-319)
319. 319 40 C.F.R. § 1508.11 (2000). [↑](#footnote-ref-320)
320. 320 40 C.F.R. § 1508.13 (2000). [↑](#footnote-ref-321)
321. 321 40 C.F.R. § 1508.27 (2000). [↑](#footnote-ref-322)
322. 322 40 C.F.R. § 1508.27(b) (2000). [↑](#footnote-ref-323)
323. 323 The northern spotted owl was listed as a threatened species under the Endangered Species Act in 1990. 55 Fed. Reg. 26,114, 26,114 (June 26, 1990). [↑](#footnote-ref-324)
324. 324 FWS delineated the owl's critical habitat in 1992. Endangered and Threatened Wildlife and Plants; Determination of Critical Habitat for the Northern Spotted Owl, 57 Fed. Reg. 1796 (Jan. 15, 1992) (to be codified at 50 C.F.R. pt. 17). [↑](#footnote-ref-325)
325. 325 The Northwest Forest Plan (NFP) withdrew 8.8 million acres from potential harvesting and designated 7.4 million acres of forest as "late successional reserves" (LSRs), of which 70% overlap with the owl's critical habitat and are generally unavailable for timber harvest. The remaining 5.5 million acres are matrix lands available for timber harvest subject to certain standards under the NFP. Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv., 378 F.3d 1059, 1064 (9th Cir. 2004). [↑](#footnote-ref-326)
326. 326 EPIC, 451 F.3d 1005, 1010 (9th Cir. 2006) (citing Native Ecosystems, 428 F.3d 1233, 1240 (9th Cir. 2005)). [↑](#footnote-ref-327)
327. 327 Id. at 1011. [↑](#footnote-ref-328)
328. 328 Intensity focuses on the "degree to which an action may adversely affect" a threatened species or critical habitat. EPIC, 451 F.3d at 1012 (citing Native Ecosystems, 428 F.3d at 1240 (rejecting need for EIS despite FONSI's acknowledgement of project's impact on individual goshawks and their habitat)). [↑](#footnote-ref-329)
329. 329 Gifford Pinchot, 378 F.3d at 1069-76. [↑](#footnote-ref-330)
330. 330 EPIC, 451 F.3d at 1012. [↑](#footnote-ref-331)
331. 331 Id. at 1013. [↑](#footnote-ref-332)
332. 332 Id. [↑](#footnote-ref-333)
333. 333 40 C.F.R. § 1508.27(b)(7) (2000). [↑](#footnote-ref-334)
334. 334 The court referenced a previous decision refusing to question this methodology and deferring to the agency's expertise in developing it. Inland Empire Pub. Lands Council v. Schultz, 992 F.2d 977, 981 (9th Cir. 1993). [↑](#footnote-ref-335)
335. 335 Initially, the Meteor and Knob timber sales were part of a larger project, "Comet," that was abandoned. When USFS issued the EA for Knob, it had just proposed Meteor, which included units in the original Comet project. EPIC, 451 F.3d at 1014. See ***Kern*** v. Bureau of Land Mgmt. (***Kern*** v. BLM), 284 F.3d 1062, 1075 (9th Cir. 2002) (holding that it is not appropriate to defer consideration of cumulative effects when meaningful consideration can be given at that time); Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1215 (9th Cir. 1998) (holding that when impractical, courts do not require the government to do analysis without enough information for meaningful consideration (quoting Inland Empire Pub. Lands Council v. USFS, 88 F.3d 754, 764 (9th Cir. 1996)). [↑](#footnote-ref-336)
336. 336 40 C.F.R. § 1508.7 (2006). [↑](#footnote-ref-337)
337. 337 USFS noted in its comments that the Meteor project was similar to the Knob project and concluded that, therefore, it "would have similar minor or negligible watershed effects." Id. [↑](#footnote-ref-338)
338. 338 241 F.3d 722, 733-35 (9th Cir. 2001) (holding that an EIS was required where the effectiveness of proposed mitigation measures was too uncertain). [↑](#footnote-ref-339)
339. 339 Native Ecosystems, 428 F.3d at 1246. [↑](#footnote-ref-340)
340. 340 USFS considered a "no-action alternative, the proposed Project alternative, and a third alternative that was similar to the Project but did not log" in any critical owl habitat. EPIC, 451 F.3d at 1016. [↑](#footnote-ref-341)
341. 341 The court found that the FS's rejection of the six alternatives because they were not tied to the stated purpose of the Project was consistent with NEPA. See Native Ecosystems, 428 F.3d at 1247 ("Alternatives that do not advance the purpose of the … Project will not be considered reasonable or appropriate."). [↑](#footnote-ref-342)
342. 342 EPIC, 451 F.3d at 1016. [↑](#footnote-ref-343)
343. 343 Id. at 1017. [↑](#footnote-ref-344)
344. 344 See Earth Island Inst. v. U.S. Forest Serv., 442 F.3d 1147, 1160 (9th Cir. 2006) (holding that "when specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own experts" and that the "courts must defer to the informed discretion of the responsible federal agencies"). [↑](#footnote-ref-345)
345. 345 16 U.S.C. § 1604(g)(3)(B) (2000). [↑](#footnote-ref-346)
346. 346 36 C.F.R. § 219.19 (2000). [↑](#footnote-ref-347)
347. 347 See 36 C.F.R. § 219.19(a)(1) (2000) (indicating that MIS species are monitored because "population changes are believed to indicate the effects of management activities"). [↑](#footnote-ref-348)
348. 348 Compare Inland Empire Public Lands Council, 88 F.3d 754, 761 (9th Cir. 1996) (assuming that maintaining habitat maintains species is "eminently reasonable"), and Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1154 (9th Cir. 1998) (agreeing "that using habitat as a proxy for population is not arbitrary and capricious."), and Gifford Pinchot Task Force, 378 F.3d 1059, 1066-67 (9th Cir. 2004) (approving habitat proxy method for northern spotted owl under the ESA), and Native Ecosystems Council, 428 F.3d 1233, 1251 (9th Cir. 2005) (stating that "the record does not demonstrate any flaws in the methodology used by the Forest Service to identify goshawk habitat"), with Idaho Sporting Cong. v. Rittenhouse, 305 F.3d 957, 972 (9th Cir. 2002) (concluding that reliance on habitat existence arbitrary and capricious where forest monitoring report indicated that, because of various invalid assumptions, "the Forest Service's methodology does not reasonably ensure viable populations of the species at issue"), and Lands Council, 395 F.3d at 1036 ("The record here shows that the proffered data is about fifteen years old, with inaccurate canopy closure estimates, and insufficient data on snags."), and Earth Island Institute, 442 F.3d 1147, 1175-76 (9th Cir. 2006) (rejecting use of habitat monitoring where forest plan required population monitoring and where there was no indication USFS consulted current studies or identified methodology in determining suitable habitat). [↑](#footnote-ref-349)
349. 349 EPIC, 451 F.3d 1005, 1017 (9th Cir. 2006). [↑](#footnote-ref-350)
350. 350 Id. at 1018. [↑](#footnote-ref-351)
351. 351 National Environmental Policy Act of 1969, 42 U.S.C.§§4321-4370e (2000). [↑](#footnote-ref-352)
352. 352 Or. Natural Res. Council v. U.S. Bureau of Land Mgmt. (ORNC), 470 F.3d 818, 819 (9th Cir. 2006). [↑](#footnote-ref-353)
353. 353 379 F.3d 738 (9th Cir. 2004). [↑](#footnote-ref-354)
354. 354 387 F.3d 989 (9th Cir. 2004). [↑](#footnote-ref-355)
355. 355 ORNC, 470 F.3d at 820. [↑](#footnote-ref-356)
356. 356 Id. [↑](#footnote-ref-357)
357. 357 ***Kern*** v. BLM, 284 F.3d 1062, 1069-70 (9th Cir. 2002). [↑](#footnote-ref-358)
358. 358 ONRC, 470 F.3d at 820. [↑](#footnote-ref-359)
359. 359 KSWC, 387 F.3d at 993. [↑](#footnote-ref-360)
360. 360 Id. at 992. [↑](#footnote-ref-361)
361. 361 ONRC, 470 F.3d at 820 (quoting Nw. Envtl. Def. Ctr. v. Gordon, 849 F.2d 1241, 1244-45 (1988)). [↑](#footnote-ref-362)
362. 362 ONRC, 470 F.3d at 821 (quoting Cantrall v. City of Long Beach, 241 F.3d 674, 678 (9th Cir. 2001)). [↑](#footnote-ref-363)
363. 363 Id. at 821. [↑](#footnote-ref-364)
364. 364 303 F.3d 1059 (9th Cir. 2002). [↑](#footnote-ref-365)
365. 365 ONRC, 470 F.3d at 821 (quoting Neighbors of Cuddy Mountain, 303 F.3d at 1066 (alteration in original)). [↑](#footnote-ref-366)
366. 366 Id. at 822. [↑](#footnote-ref-367)
367. 367 Id. [↑](#footnote-ref-368)
368. 368 Id. (citing KSWC, 387 F.3d 989, 994 (9th Cir. 2004)). [↑](#footnote-ref-369)
369. 369 Id. at 823. [↑](#footnote-ref-370)
370. 370 Id. at 824. [↑](#footnote-ref-371)
371. 371 Id. [↑](#footnote-ref-372)
372. 372 National Environmental Policy Act of 1969, 42 U.S.C.§§4321-4370e (2000). [↑](#footnote-ref-373)
373. 373 Nw. Envtl. Advocates v. Nat'l Marine Fisheries Serv. (Nw. Envtl. Advocates), 460 F.3d 1125, 1131 (9th Cir. 2006). [↑](#footnote-ref-374)
374. 374 Id. [↑](#footnote-ref-375)
375. 375 33 U.S.C. § 1341 (2000). [↑](#footnote-ref-376)
376. 376 Coastal Zone Management Act of 1972, 16 U.S.C.§§1451-1465 (2000). [↑](#footnote-ref-377)
377. 377 The Ninth Circuit ruled that under Asarco, Inc. v. U. S. Environmental Protection Agency, a court may not consider extra-record evidence "to determine the correctness or wisdom of the agency's decision." 616 F.2d 1153, 1160 (9th Cir. 1980). [↑](#footnote-ref-378)
378. 378 5 U.S.C. § 706(2)(A) (2000). [↑](#footnote-ref-379)
379. 379 Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt., 387 F.3d 989, 993 (9th Cir. 2004) (quoting Churchill County v. Norton, 276 F.3d 1060, 1072 (9th Cir. 2001)). [↑](#footnote-ref-380)
380. 380 NEPA requires agencies to prepare EISs with a "full and fair discussion of significant environmental impacts." 40 C.F.R. § 1502.1 (2006). An EIS must provide a "useful analysis of the cumulative impact of past, present, and future projects." City of Carmel-by-the-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1160 (9th Cir. 1997). [↑](#footnote-ref-381)
381. 381 Sw. Ctr. For Biological Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1447 (9th Cir. 1996). [↑](#footnote-ref-382)
382. 382 The estuary naturally functions as a "sand sink" by drawing sand away from the shorelines, accelerating coastal erosion. Nw. Envtl. Advocates, 460 F.3d 1125, 1134 (9th Cir. 2006). [↑](#footnote-ref-383)
383. 383 Id. at 1135. [↑](#footnote-ref-384)
384. 384 Id. at 1136. [↑](#footnote-ref-385)
385. 385 Id. [↑](#footnote-ref-386)
386. 386 Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt., 387 F.3d 989, 997 (9th Cir. 2004). [↑](#footnote-ref-387)
387. 387 The court noted that while "not dispositive, we have found it "significant' when other governmental agencies responsible for environmental protection have sanctioned a particular project's environmental analyses." See Friends of the Payette v. Horseshoe Bend Hydroelectric Co., 988 F.2d 989, 995 (9th Cir. 1993) (finding EPA and FWS approval of a Corps permitting decision significant where the Corps responded to those agencies' specific concerns). [↑](#footnote-ref-388)
388. 388 See Lands Council v. Powell, 395 F.3d 1019, 1027 (9th Cir. 2005) (describing as insufficient an EIS that failed to discuss past timber harvesting projects which might have informed analysis about alternatives for the current project). [↑](#footnote-ref-389)
389. 389 The Corps tested twenty-three samples, two of which were from outside the navigation channel, and none contained toxics at a "level of concern." Nw. Envtl. Advocates, 460 F.3d 1125, 1142 (9th Cir. 2006). [↑](#footnote-ref-390)
390. 390 The Corps used its own model (the WES RMA-10 method), a model from SEI (focusing on low flow conditions), and a model from the Oregon Health and Sciences University/Oregon Graduate Institute commissioned specifically for the 2003 FSEIS. [↑](#footnote-ref-391)
391. 391 Nw. Envtl. Advocates, 460 F.3d at 1143. [↑](#footnote-ref-392)
392. 392 Id. [↑](#footnote-ref-393)
393. 393 Id. at 1144. [↑](#footnote-ref-394)
394. 394 Id. at 1144. [↑](#footnote-ref-395)
395. 395 District courts may admit extra-record evidence: 1) if admission is necessary to determine "whether the agency has considered all relevant factors and has explained its decision"; 2) if "the agency has relied on documents not in the record"; 3) "when supplementing the record is necessary to explain technical terms or complex subject matter"; or 4) "when plaintiffs make a showing of agency bad faith." Lands Council, 395 F.3d 1019, 1030 (9th Cir. 2005). [↑](#footnote-ref-396)
396. 396 Nw. Envtl. Advocates, 460 F.3d at 1156 n.5. [↑](#footnote-ref-397)
397. 397 Federal Land Policy and Management Act of 1976, 43 U.S.C. §§1701-1785 (2000). [↑](#footnote-ref-398)
398. 398 National Environmental Policy Act of 1969, 42 U.S.C.§§4321-4370e (2000). [↑](#footnote-ref-399)
399. 399 Whereas pre-disturbance surveys are required for Category C listed species, they are not required for species listed under Category D. [↑](#footnote-ref-400)
400. 400 Native Ecosystems Council v. U.S. Forest Serv., 428 F.3d 1233, 1238 (9th Cir. 2005). [↑](#footnote-ref-401)
401. 401 Administrative Procedure Act, 5 U.S.C.§§551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5362, 7521 (2000). [↑](#footnote-ref-402)
402. 402 Id. § 706(2)(A). [↑](#footnote-ref-403)
403. 403 2006 WL 44361, No. 04-844P (W.D. Wash. Jan. 9, 2006). In that case, KS Wild and Umpqua Watersheds successfully invalidated a 2004 Record of Decision that would have completely eliminated the Survey and Manage program. [↑](#footnote-ref-404)
404. 404 Klamath Siskiyou Wildlands Ctr. v. Boody, 468 F.3d 549, 555 (9th Cir. 2006). [↑](#footnote-ref-405)
405. 405 Id. (emphasis omitted). [↑](#footnote-ref-406)
406. 406 Apache Survival Coalition v. United States, 21 F.3d 895, 905 (9th Cir. 1994) (italics omitted). [↑](#footnote-ref-407)
407. 407 Klamath Siskiyou Wildlands, 468 F.3d at 555. [↑](#footnote-ref-408)
408. 408 Neighbors of Cuddy Mountain v. U.S. Forest Serv., 137 F.3d 1372, 1381 n.8 (9th Cir. 1998). [↑](#footnote-ref-409)
409. 409 Apache Survival Coalition, 21 F.3d at 905-06. [↑](#footnote-ref-410)
410. 410 The formal amendment process entails preparation of environmental assessments or environmental impact statements, public involvement, and interagency coordination. 43 C.F.R. § 1610.5-5 (2006). [↑](#footnote-ref-411)
411. 411 43 C.F.R. § 1610.5-4 (2006). [↑](#footnote-ref-412)
412. 412 43 U.S.C. § 1732(a) (2000); 43 C.F.R. § 1610.5-3(a) (2006). [↑](#footnote-ref-413)
413. 413 43 C.F.R. § 1610.5-5 (2006). [↑](#footnote-ref-414)
414. 414 Klamath Siskiyou Wildlands, 468 F.3d 549, 558 (9th Cir. 2006). [↑](#footnote-ref-415)
415. 415 Id. at 559. [↑](#footnote-ref-416)
416. 416 40 C.F.R. § 1502.9(c)(1) (2006). [↑](#footnote-ref-417)
417. 417 See Marsh v. Or. Natural Res. Council, 490 U.S. 360, 373 (1989) ("An agency need not supplement an EIS every time new information comes to light after the EIS is finalized."). [↑](#footnote-ref-418)
418. 418 542 U.S. 55 (2004). [↑](#footnote-ref-419)
419. 419 42 U.S.C. § 4332(2)(C) (2000). [↑](#footnote-ref-420)
420. 420 SUWA, 542 U.S. at 73. [↑](#footnote-ref-421)
421. 421 40 C.F.R. § 1502.9(c)(1) (2006). [↑](#footnote-ref-422)
422. 422 137 F.3d 1146 (9th Cir. 1998). [↑](#footnote-ref-423)
423. 423 Id. at 1149-50. [↑](#footnote-ref-424)
424. 424 Klamath Siskiyou Wildlands, 468 F.3d 549, 562 (9th Cir. 2006) (quoting Metcalf v. Daley, 214 F.3d 1135, 1143 (9th Cir. 2000)). [↑](#footnote-ref-425)
425. 425 43 C.F.R. 1610.5-3 (2006). [↑](#footnote-ref-426)
426. 426 See Paulsen v. Daniels, 413 F.3d 999, 1008 (9th Cir. 2005) ("The effect of invalidating an agency rule is to reinstate the rule previously in force."). [↑](#footnote-ref-427)
427. 427 National Environmental Policy Act of 1969, 42 U.S.C.§§4321-4370e (2000). [↑](#footnote-ref-428)
428. 428 42 U.S.C. § 2201(b) (2000); 10 C.F.R. § 71.0 (2006). [↑](#footnote-ref-429)
429. 429 49 U.S.C. § 5103(a), (b)(1) (2000). [↑](#footnote-ref-430)
430. 430 Nuclear Regulatory Comm'n (NRC) Final Rule, 69 Fed. Reg. 3698, 3711-20, 3765, 3791, 3807-13 (Jan. 26, 2004) (to be codified at 10 C.F.R. pt. 71); see also Dep't of Transp. (DOT) Final Rule, 69 Fed. Reg. 3632, 3634-36, 3656, 3658 (Jan. 26, 2004) (to be codified at 49 C.F.R. pts. 171-78). [↑](#footnote-ref-431)
431. 431 NRC Final Rule, 69 Fed. Reg. at 3719. [↑](#footnote-ref-432)
432. 432 DOT Final Rule, 69 Fed. Reg. at 3632. [↑](#footnote-ref-433)
433. 433 See 28 U.S.C. § 2342(4) (2000) (providing for direct review in the court of appeals). [↑](#footnote-ref-434)
434. 434 The DOT case was decided in Nuclear Info. & Res. Serv. v. Dep't of Transp., 457 F.3d 956 (9th Cir. 2006). [↑](#footnote-ref-435)
435. 435 See DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854, 1860-61 (2006) (emphasizing the importance of the case-and-controversy requirement). [↑](#footnote-ref-436)
436. 436 City of Sausalito v. O'Neill, 386 F.3d 1186, 1197-99 (9th Cir. 2004). [↑](#footnote-ref-437)
437. 437 Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)); see also Allen v. Wright, 468 U.S. 737, 751 (1984) (discussing how the standing doctrine "embraces" judicial restraint with respect to jurisdictional limits, and limits on adjudicating generalized grievances). [↑](#footnote-ref-438)
438. 438 City of Sausalito, 386 F.3d at 1197. [↑](#footnote-ref-439)
439. 439 Id. (quoting Citizens for Better Forestry v. U.S. Dep't of Agric., 341 F.3d 961, 969-70 (9th Cir. 2003)) (alterations in original). [↑](#footnote-ref-440)
440. 440 Id. (citing Sierra Club v. Morton, 405 U.S. 727, 738 (1972)). [↑](#footnote-ref-441)
441. 441 Ashley Creek Phosphate Co. v. Norton, 420 F.3d 934, 938 (9th Cir. 2005) (citing Cantrell v. City of Long Beach, 241 F.3d 674, 679 (9th Cir. 2001)). [↑](#footnote-ref-442)
442. 442 Cantrell, 241 F.3d at 682; see also Hall v. Norton, 266 F.3d 969, 975 (9th Cir. 2001) (when seeking to enforce a procedural requirement, a plaintiff can establish standing without meeting the "normal standards" for redressability). [↑](#footnote-ref-443)
443. 443 Hall, 266 F.3d at 977 (quoting Churchill County v. Babbit, 150 F.3d 1072, 1078 (9th Cir. 1998), amended by 158 F.3d 491 (9th Cir. 1998)). [↑](#footnote-ref-444)
444. 444 Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 181 (2000) (citing Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977)). [↑](#footnote-ref-445)
445. 445 Ashley Creek, 420 F.3d at 939. [↑](#footnote-ref-446)
446. 446 Churchill County, 150 F.3d at 1078 (citing Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 882-83 (1990)). [↑](#footnote-ref-447)
447. 447 Nuclear Info. & Res. Serv. v. Nuclear Regulatory Comm'n, 457 F.3d 941, 953 (9th Cir. 2006). [↑](#footnote-ref-448)
448. 448 Id. [↑](#footnote-ref-449)
449. 449 Id. [↑](#footnote-ref-450)
450. 450 Id. [↑](#footnote-ref-451)
451. 451 Id. at 954. [↑](#footnote-ref-452)
452. 452 32 F.3d 1346 (9th Cir. 1994). [↑](#footnote-ref-453)
453. 453 Id. at 1352-53. [↑](#footnote-ref-454)
454. 454 504 U.S. 555 (1992). [↑](#footnote-ref-455)
455. 455 Id. at 573-74. [↑](#footnote-ref-456)
456. 456 See, e.g., Citizens for Better Forestry v. U.S. Dep't of Agric., 341 F.3d 961, 972 (9th Cir. 2003). [↑](#footnote-ref-457)
457. 457 40 C.F.R. §§1508.8(b), 1508.27(b)(1) (2006). [↑](#footnote-ref-458)
458. 458 Nuclear Info. & Res. Serv. v. Nuclear Regulatory Comm'n, 457 F.3d 941, 954 (9th Cir. 2006). [↑](#footnote-ref-459)
459. 459 Id. at 955. [↑](#footnote-ref-460)
460. 460 Hall v. Norton, 266 F.3d 969, 977 (9th Cir. 2001). [↑](#footnote-ref-461)
461. 461 10 C.F.R. § 71.5(a) (2006). [↑](#footnote-ref-462)
462. 462 National Environmental Policy Act of 1969, 42 U.S.C.§§4321-4370e (2000). [↑](#footnote-ref-463)
463. 463 National Forest Management Act of 1976, 16 U.S.C§§472a, 512b, 1600, 1611-1614 (2000) (amending Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476). [↑](#footnote-ref-464)
464. 464 The other alternatives were a "no action" alternative and an alternative to permit salvage logging on 4188 acres. Lands Council v. Martin, 479 F.3d 636, 638 (9th Cir. 2007). [↑](#footnote-ref-465)
465. 465 Id. (quoting Clean Channel Outdoor Inc. v. City of Los Angeles, 340 F.3d 810, 813 (9th Cir. 2003) (alteration in original)). [↑](#footnote-ref-466)
466. 466 See Sw. Voter Registration Educ. Project v. Shelley, 344 F.3d 914, 918 (9th Cir. 2003). [↑](#footnote-ref-467)
467. 467 Wilderness Act of 1964, 16 U.S.C.§§1131-1136 (2000). [↑](#footnote-ref-468)
468. 468 See Nat'l Audubon Soc'y v. U.S. Forest Serv., 46 F.3d 1437, 1448 (9th Cir. 1993) (holding that NEPA would require consideration of logging in inventoried areas); Smith v. U.S. Forest Serv., 33 F.3d 1072, 1079 (9th Cir. 1994) (holding that NEPA would apply to uninventoried roadless areas that contain more than 5000 acres). [↑](#footnote-ref-469)
469. 469 The "Eastside Screens" were originally published in the Forest Service's "Environmental Assessment for the Continuation of Interim Management Direction Establishing Riparian, Ecosystem, and Wildlife Standards for Timber Sales," Appendix B, June 1995. They have since been appended to several forest plans, including the Umatilla's Forest Plan. [↑](#footnote-ref-470)
470. 470 Lands Council v. Martin, 479 F.3d 636, 641 (9th Cir. 2007). [↑](#footnote-ref-471)
471. 471 42 U.S.C. §§7401-7671(q) (2000). [↑](#footnote-ref-472)
472. 472 Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A) (2000). [↑](#footnote-ref-473)
473. 473 Approval and Promulgation of Air Quality Implementation Plan; Idaho, 70 Fed. Reg. 39,658, 39,660 (July 11, 2005) (to be codified at 40 C.F.R. pt. 52). [↑](#footnote-ref-474)
474. 474 42 U.S.C. § 7409(a). [↑](#footnote-ref-475)
475. 475 42 U.S.C. § 7407(a); see generally Train v. Natural Res. Def. Council (Train), 421 U.S. 60, 64-70 (1975) (stating that that EPA is required to approve SIPs that provide for attainment and maintenance of ambient air standards). [↑](#footnote-ref-476)
476. 476 Train, 421 U.S. at 64. [↑](#footnote-ref-477)
477. 477 Trs. for Ala. v. Fink, 17 F.3d 1209, 1211 n.3 (9th Cir. 1994). [↑](#footnote-ref-478)
478. 478 42 U.S.C. § 7410(a)(2)(H). [↑](#footnote-ref-479)
479. 479 Hall v. U.S. Envtl. Prot. Agency, 273 F.3d 1146, 1159-60 (9th Cir. 2001). [↑](#footnote-ref-480)
480. 480 42 U.S.C. § 7410(k)(3). [↑](#footnote-ref-481)
481. 481 42 U.S.C. § 7410(l) (alteration in original). [↑](#footnote-ref-482)
482. 482 See Approval and Promulgation of Implementation Plans, 58 Fed. Reg. 39,445, 39,446 (July 23, 1993) (noting that in Idaho's submission, "the existing Rules for Control of Open Burning and Categories of Allowable Burning were revised extensively"). [↑](#footnote-ref-483)
483. 483 See Approval and Promulgation of Air Quality Implementation Plan; Idaho, supra note 473, at 39,659. [↑](#footnote-ref-484)
484. 484 Idaho Administrative Code, § 58.01.01.617 (2003). [↑](#footnote-ref-485)
485. 485 Stating that "petition for review of the action of the Administrator in any national primary or secondary promulgating air quality standards, and emission standard or requirement … [under relevant provisions that are] … locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit." 42 U.S.C. § 7607(b)(1). [↑](#footnote-ref-486)
486. 486 Hall v. U.S. Envtl. Prot. Agency, 273 F.3d 1146, 1144 (9th Cir. 2001); 5 U.S.C. § 706(2)(A). [↑](#footnote-ref-487)
487. 487 Approval and Promulgation of Implementation Plans, 68 Fed. Reg. 2217, 2222 (Jan. 16, 2003). [↑](#footnote-ref-488)
488. 488 See Approval and Promulgation of Air Quality Implementation Plan; Idaho, supra note 473, at 39,659 ("EPA recognizes the rule language … does not, on its face, appear to identify crop residue as a category of allowed burning."); id. at 39,660 n.1 (noting EPA's agreement with SAFE that field burning does not come within the "prescribed burning" exception). [↑](#footnote-ref-489)
489. 489 Safe Air for Everyone v. U.S. Envtl. Prot. Agency, 475 F.3d 1096, 1095, 1108 (9th Cir. 2007), (citing Bayview Hunters Point Cmty. Advocates v. Metro. Transp. Comm'n, 366 F.3d 692 (9th Cir. 2004)). [↑](#footnote-ref-490)
490. 490 Cf. Craft v. Nat'l Park Serv., 34 F.3d 918, 922 (9th Cir. 1994). [↑](#footnote-ref-491)
491. 491 Id. at 1104. [↑](#footnote-ref-492)
492. 492 Id. [↑](#footnote-ref-493)
493. 493 Approval and Promulgation of Air Quality Implementation Plan; Idaho, supra note 473, at 39,659. [↑](#footnote-ref-494)
494. 494 See id. at 39,660. [↑](#footnote-ref-495)
495. 495 Safe Air for Everyone v. U.S. Envtl. Prot. Agency (SAFE), 475 F.3d 1096, 1105 (9th Cir. 2007). [↑](#footnote-ref-496)
496. 496 See Arkansas v. Oklahoma, 503 U.S. 91, 110 (1992) (stating that the Clean Water Act "effectively incorporates into federal law those state-law standards the Agency reasonably determines to be "applicable'"). [↑](#footnote-ref-497)
497. 497 Trs. for Ala. v. Fink, 17 F.3d 1209, 1210 n.3 (1994). [↑](#footnote-ref-498)
498. 498 SAFE, 475 F.3d at 1105. [↑](#footnote-ref-499)
499. 499 Wards Cove Packing Corp. v. Nat'l Marine Fisheries Serv., 307 F.3d 1214, 1219 (9th Cir. 2002). [↑](#footnote-ref-500)
500. 500 See id. [↑](#footnote-ref-501)
501. 501 Dyer v. United States (Dyer), 832 F.2d 1062, 1066 (9th Cir. 1987) (alteration in original). [↑](#footnote-ref-502)
502. 502 SAFE, 475 F.3d at 1105. [↑](#footnote-ref-503)
503. 503 Administrative Procedure Act, 5 U.S.C.§§552(a)(1), 553(b) (2000). [↑](#footnote-ref-504)
504. 504 SAFE, 475 F.3d at 1105-06. [↑](#footnote-ref-505)
505. 505 5 U.S.C. § 553(c); see Ober v. U.S. Envtl. Prot. Agency, 84 F.3d 304, 312 (9th Cir. 1996) (holding that the opportunity to comment applies to SIP revisions). [↑](#footnote-ref-506)
506. 506 SAFE, 475 F.3d at 1106; see Exportal Ltd. v. United States, 902 F.2d 45, 50-51 (D.C. Cir. 1990) (noting that "the plain meaning doctrine is an interpretative norm essential to perfecting the scheme of administrative governance established by the APA"). [↑](#footnote-ref-507)
507. 507 42 U.S.C. § 7607(b)(1) (2000). [↑](#footnote-ref-508)
508. 508 Dyer, 832 F.2d 1062, 1066 (9th Cir. 1987). [↑](#footnote-ref-509)
509. 509 See SAFE, 475 F.3d at 1100-01. [↑](#footnote-ref-510)
510. 510 Id. at 1107. [↑](#footnote-ref-511)
511. 511 See Sec. and Exch. Comm'n v. Chenery Corp. (SEC v. Chenery), 318 U.S. 80, 87 (1943); Ctr. for Biological Diversity v. Kempthorne, 466 F.3d 1098, 1103-04 (9th Cir. 2006). [↑](#footnote-ref-512)
512. 512 The court stated that it owed no deference to post hoc litigation positions. See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988). [↑](#footnote-ref-513)
513. 513 SAFE, 475 F.3d at 1115. [↑](#footnote-ref-514)
514. 514 See Riverside Cement Co. v. Thomas (Riverside Cement), 843 F.2d 1246, 1247-48 (9th Cir. 1988); Bethlehem Steel Corp. v. Gorsuch, 742 F.2d 1028, 1035-36 (7th Cir. 1984); Hall v. U.S. Envtl. Prot. Agency, 273 F.3d 1146, 1153 (9th Cir. 2001); Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 470 (2001). [↑](#footnote-ref-515)
515. 515 SAFE, 475 F.3d at 1116 (emphasis in original). [↑](#footnote-ref-516)
516. 516 Id. [↑](#footnote-ref-517)
517. 517 Riverside Cement, 843 F.2d at 1247. [↑](#footnote-ref-518)
518. 518 Id. at 1248. [↑](#footnote-ref-519)
519. 519 SAFE, 475 F.3d at 1117. [↑](#footnote-ref-520)
520. 520 42 U.S.C. §§7410(l), 7515 (2000). [↑](#footnote-ref-521)
521. 521 SAFE, 475 F.3d at 1117. [↑](#footnote-ref-522)
522. 522 Approval and Promulgation of Air Quality Implementation Plan; Idaho, supra note 473, at 39,659 (emphasis added by 9th Cir.). [↑](#footnote-ref-523)
523. 523 Id. at 39,660. [↑](#footnote-ref-524)
524. 524 SAFE, 475 F.3d at 1118. [↑](#footnote-ref-525)
525. 525 Sec. Exch. Comm'n v. Chenery Corp. (SEC v. Chenery Corp.), 318 U.S. 80, 87 (1943); see also Ctr. for Biological Diversity v. Kempthorne, 466 F.3d 1098, 1103-04 (9th Cir. 2006) (explaining that the court cannot substitute a new basis for the agency's decision when it finds the previous basis to be inadequate). [↑](#footnote-ref-526)
526. 526 Immigration and Naturalization Serv. v. Ventura (INS v. Ventura), 537 U.S. 12, 16 (2002) (per curiam) (quoting Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985)). [↑](#footnote-ref-527)
527. 527 Hall v. U.S. Envtl. Prot. Agency, 273 F.3d 1146, 1155 (9th Cir. 2001). [↑](#footnote-ref-528)
528. 528 SAFE, 475 F.3d at 1119. [↑](#footnote-ref-529)
529. 529 A coffer dam is a temporary structure that controls water flows to allow for construction of a permanent dam. [↑](#footnote-ref-530)
530. 530 Federal Water Pollution Control Act, 33 U.S.C.§§1251-1387 (2000). [↑](#footnote-ref-531)
531. 531 Se. Ala. Conservation Council v. U.S. Army Corps of Eng'rs, 472 F.3d 1097, 1099 (9th Cir. 2006). [↑](#footnote-ref-532)
532. 532 127 S. Ct. 5 (2006). [↑](#footnote-ref-533)
533. 533 Se. Ala. Conservation Council, 472 F.3d at 1100 (quoting Ranchers Cattleman Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric., 415 F.3d 1078, 1092 (9th Cir. 2005)(citations omitted)). [↑](#footnote-ref-534)
534. 534 Id. (quoting Ranchers Cattleman Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric., 415 F.3d at 1092 (internal quotations and citations omitted)). [↑](#footnote-ref-535)
535. 535 Id. (emphasis in original). [↑](#footnote-ref-536)
536. 536 Id. 472 F.3d at 1101. [↑](#footnote-ref-537)
537. 537 Id. [↑](#footnote-ref-538)
538. 538 Id. (quoting the court's earlier order). [↑](#footnote-ref-539)
539. 539 Federal Water Pollution Control Act, 33 U.S.C.§§1251-1387 (2000). [↑](#footnote-ref-540)
540. 540 Id. § 1311(a). [↑](#footnote-ref-541)
541. 541 Id. § 1362(7). [↑](#footnote-ref-542)
542. 542 33 C.F.R. § 328.3(a)(7) (2006). [↑](#footnote-ref-543)
543. 543 Id. § 328.3(b). [↑](#footnote-ref-544)
544. 544 Id. § 328.3(c). [↑](#footnote-ref-545)
545. 545 474 U.S. 121 (1985). [↑](#footnote-ref-546)
546. 546 Northern California River Watch v. City of Healdsburg, 457 F.3d 1023, 1027 (9th Cir. 2006). [↑](#footnote-ref-547)
547. 547 33 C.F.R. § 328.3(b) (2006). [↑](#footnote-ref-548)
548. 548 See Leslie Salt Co. v. United States, 896 F.2d 354, 359-60 (9th Cir. 1990) (rejecting a district court's interpretation that the CWA regulations create a distinction between man-made and natural waters). [↑](#footnote-ref-549)
549. 549 33 U.S.C. § 1362(7) (2000). [↑](#footnote-ref-550)
550. 550 126 U.S. 2208 (2006). [↑](#footnote-ref-551)
551. 551 430 U.S. 188, 193 (1977) (explaining that "when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976))). [↑](#footnote-ref-552)
552. 552 Rapanos, 126 U.S. at 2248. [↑](#footnote-ref-553)
553. 553 Id. [↑](#footnote-ref-554)
554. 554 Id. at 2251. [↑](#footnote-ref-555)
555. 555 531 U.S. 159 (2001). [↑](#footnote-ref-556)
556. 556 33 C.F.R. § 328.3(a)(8) (2006). [↑](#footnote-ref-557)
557. 557 Northern California River Watch v. City of Healdsburg, 457 F.3d 1023, 1032 (9th Cir. 2006). [↑](#footnote-ref-558)
558. 558 Id. (citing 33 C.F.R. § 328.3(a) (2006)). [↑](#footnote-ref-559)
559. 559 Administrative Procedure Act, 5 U.S.C.§§551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5362, 7521 (2000). [↑](#footnote-ref-560)
560. 560 Endangered Species Act of 1973, 16 U.S.C.§§1531-1544 (2000). [↑](#footnote-ref-561)
561. 561 The BVL shrew is a subspecies of ornate shrews, endemic to ***Kern*** County, California; fewer than 30 are known to exist. Endangered and Threatened Wildlife and Plants; Endangered Status for the Buena Vista Lake Shrew, 67 Fed. Reg. 10,101, 10,110 (Mar. 6, 2002) (to be codified at 50 C.F.R. pt. 17). [↑](#footnote-ref-562)
562. 562 Endangered and Threatened Wildlife and Plants; Proposed Endangered Status for the Buena Vista Lake Shrew, 65 Fed. Reg. 35,033 (proposed June 1, 2000) (to be codified at 50 C.F.R. pt. 17). [↑](#footnote-ref-563)
563. 563 Id. at 35,034. [↑](#footnote-ref-564)
564. 564 Id. at 35,036. [↑](#footnote-ref-565)
565. 565 Id. at 35,038. [↑](#footnote-ref-566)
566. 566 Id. at 35,039. [↑](#footnote-ref-567)
567. 567 Endangered and Threatened Wildlife and Plants; Endangered Status for the Buena Vista Lake Shrew, 67 Fed. Reg. 10,101, 10,105 (Mar. 6, 2002) (to be codified at 50 C.F.R. pt. 17). [↑](#footnote-ref-568)
568. 568 Id. at 10,101. [↑](#footnote-ref-569)
569. 569 Id. at 10,110. [↑](#footnote-ref-570)
570. 570 The ESA requires species listing decisions to comply with the notice and comment requirements of section 553 of the APA. Endangered Species Act of 1973, 16 U.S.C. § 1533(b)(4) (2000). [↑](#footnote-ref-571)
571. 571 Administrative Procedure Act, 5 U.S.C. § 553(b)-(c) (2000). [↑](#footnote-ref-572)
572. 572 See Interagency Cooperation - Endangered Species Act of 1973, 50 C.F.R. § 402.01(b) (2006) (declaring FWS and National Marine Fisheries Service (NMFS) jointly responsible for administering the ESA). [↑](#footnote-ref-573)
573. 573 Endangered Species Act of 1973, 16 U.S.C. § 1533(a)(1)(A)-(E) (2000). [↑](#footnote-ref-574)
574. 574 Id. § 1533(b)(1)(A). [↑](#footnote-ref-575)
575. 575 Id. § 1533(b)(8). [↑](#footnote-ref-576)
576. 576 5 U.S.C. § 706(2)(A), (D) (2000). [↑](#footnote-ref-577)
577. 577 Independent Acceptance Co. v. Cal., 204 F.3d 1247, 1251 (9th Cir. 2000) (citing Cal. Hosp. Ass'n v. Schweiker, 559 F. Supp 110, 116 (D. Cal 1982)). [↑](#footnote-ref-578)
578. 578 Marsh v. Or. Natural Res. Council, 490 U.S. 360, 376 (1989). [↑](#footnote-ref-579)
579. 579 Campanale & Sons, Inc. v. Evans, 311 F.3d 109, 116 (6th Cir. 2004) (internal citation omitted). [↑](#footnote-ref-580)
580. 580 Natural Res. Def. Council, Inc. v. EPA, 279 F.3d 1180, 1186 (9th Cir. 2002). [↑](#footnote-ref-581)
581. 581 ***Kern*** County Farm Bureau v. Allen, 450 F.3d 1072, 1075 (9th Cir. 2006). [↑](#footnote-ref-582)
582. 582 Solite Corp. v. EPA, 952 F.2d 473, 484 (D.C. Cir. 1991). [↑](#footnote-ref-583)
583. 583 Id. [↑](#footnote-ref-584)
584. 584 Rybachek v. EPA, 904 F.2d 1276, 1286 (9th Cir. 1990). [↑](#footnote-ref-585)
585. 585 598 F.2d 637 (1st Cir. 1979). [↑](#footnote-ref-586)
586. 586 Id. at 644-45. [↑](#footnote-ref-587)
587. 587 58 F.3d 1392 (9th Cir. 1995). [↑](#footnote-ref-588)
588. 588 ***Kern*** County, 450 F.3d 1075, 1076 (9th Cir. 2006) (citing Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1402 (9th Cir. 1995)). [↑](#footnote-ref-589)
589. 589 952 F.2d 473 (D.C. Cir. 1991). [↑](#footnote-ref-590)
590. 590 ***Kern*** County, 450 F.3d at 1076. [↑](#footnote-ref-591)
591. 591 Solite Corp., 952 F.2d at 484-85, 500. [↑](#footnote-ref-592)
592. 592 Jesus E. Maldonado, et al., Tripartite Genetic Subdivisions in the Ornate Shrew (Sorex ornatus), 10 Molecular Ecology 127 (2001). [↑](#footnote-ref-593)
593. 593 Jesus E. Maldonado, Discordant Patters of Morphological Variation in Genetically Divergent Populations of Ornate Shrews (Sorex Ornatus), 85 J. of Mammology 886 (2004). [↑](#footnote-ref-594)
594. 594 Daniel Williams & Adam Harpster, Status of the Buena Vista Lake Shrew (Sorex ornatus relictus) (Oct. 29, 2001) (unpublished report). [↑](#footnote-ref-595)
595. 595 See Endangered Species Act of 1973, 16 U.S.C. § 1532(16) (2000). [↑](#footnote-ref-596)
596. 596 65 Fed. Reg. 35,033, 35,033-34 (June 1, 2000). [↑](#footnote-ref-597)
597. 597 16 U.S.C. § 1532(6) (2000). [↑](#footnote-ref-598)
598. 598 Id. § 1533(b)(1)(A). [↑](#footnote-ref-599)
599. 599 Sw. Ctr. For Biological Diversity v. Babbitt, 215 F.3d 58, 60 (D.C. Cir. 2000); see also Conner v. Burford, 848 F.2d 1441, 1454 (9th Cir. 1988) (stating that an agency "cannot ignore available biological information"). [↑](#footnote-ref-600)
600. 600 Bldg. Indus. Ass'n of Superior Cal. v. Norton, 247 F.3d 1241, 1246-47 (D.C. Cir. 2001). [↑](#footnote-ref-601)
601. 601 16 U.S.C. § 1533(b)(8) (2000). [↑](#footnote-ref-602)
602. 602 Endangered Species Act of 1973, 16 U.S.C.§§1531-1544 (2000). [↑](#footnote-ref-603)
603. 603 50 C.F.R. § 402.16 (2005). [↑](#footnote-ref-604)
604. 604 16 U.S.C. § 1536(a)(2) (2000). [↑](#footnote-ref-605)
605. 605 Id. § 1536(c). [↑](#footnote-ref-606)
606. 606 Id. § 1536(b)(3)(A). [↑](#footnote-ref-607)
607. 607 50 C.F.R. § 402.13 (2005). [↑](#footnote-ref-608)
608. 608 Id. [↑](#footnote-ref-609)
609. 609 Id. § 402.16(b). [↑](#footnote-ref-610)
610. 610 Id. § 402.16(c). [↑](#footnote-ref-611)
611. 611 Forest Guardians v. Johanns, 450 F.3d 455, 460-61 (9th Cir. 2006). [↑](#footnote-ref-612)
612. 612 The result of the re-initiated consultation was an FWS finding that the grazing was "not likely to adversely affect" the endangered species and critical habitat within the Water Canyon allotment. [↑](#footnote-ref-613)
613. 613 Am. Rivers v. Nat'l Marine Fisheries Serv., 126 F.3d 1118, 1123 (9th Cir. 1997). [↑](#footnote-ref-614)
614. 614 Nw. Envtl. Def. Ctr. v. Gordon, 849 F.2d 1241, 1244 (9th Cir. 1988) (emphasis in original). [↑](#footnote-ref-615)
615. 615 S. Or. Barter Fair v. Jackson County, 372 F.3d 1128, 1134 (9th Cir. 2004). [↑](#footnote-ref-616)
616. 616 Compare S. Utah Wilderness Alliance v. Smith, 110 F.3d 724 (10th Cir. 1997) (finding a claim moot because the relevant agency undertook ESA consultation with FWS regarding a forest management plan). [↑](#footnote-ref-617)
617. 617 See also Nw. Envtl. Def. Ctr., 849 F.2d at 1241 (determining that while an injunction was no longer appropriate to enforce a fisheries management plan because the salmon season had ended, declaratory relief was available and would ensure future compliance). [↑](#footnote-ref-618)
618. 618 The adequacy of USFS's monitoring was not disputed by either party, and therefore not addressed by the court. [↑](#footnote-ref-619)
619. 619 50 C.F.R. § 402.16 (2005). [↑](#footnote-ref-620)
620. 620 Endangered Species Act of 1973, 16 U.S.C. § 1536(a)(2) (2000). [↑](#footnote-ref-621)
621. 621 In Sierra Club v. Marsh, 816 F.2d 1376 (9th Cir. 1987), the plaintiffs sued the Army Corps of Engineers for refusing to re-initiate consultation with FWS when mitigation projects required by the development plan were not implemented. The court determined that the Army Corps of Engineers had violated ESA regulations because failing to implement mitigation measures could impact an endangered species in a way or manner not previously considered. [↑](#footnote-ref-622)
622. 622 See id. (noting that only the most important project modifications require an agency to re-initiate consultation). [↑](#footnote-ref-623)
623. 623 See Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv., 378 F.3d 1059 (9th Cir. 2004) (determining the Northwest Forest Plan required species monitoring to support the no-jeopardy finding under the ESA, and absent the monitoring, there would be no basis for the finding). [↑](#footnote-ref-624)
624. 624 420 F.3d 946 (9th Cir. 2005) (Defenders), en banc reh'g denied, 450 F.3d 394 (9th Cir. 2006) (Defenders II). [↑](#footnote-ref-625)
625. 625 Federal Water Pollution Control Act, 33 U.S.C. § 1311(a) (2000). [↑](#footnote-ref-626)
626. 626 Endangered Species Act of 1973, 16 U.S.C.§§1531-1544 (2000). [↑](#footnote-ref-627)
627. 627 Defenders, 420 F.3d at 950. [↑](#footnote-ref-628)
628. 628 33 U.S.C. § 1342(b) (2000). [↑](#footnote-ref-629)
629. 629 16 U.S.C. § 1536(a)(2) (2000). [↑](#footnote-ref-630)
630. 630 The ESA's regulations require an agency to determine whether a proposed action may affect endangered species or critical habitat of endangered species, and if so, to consult formally with the Fish and Wildlife Service or the National Marine Fisheries Service. 50 C.F.R. § 402.14(a) (2000). [↑](#footnote-ref-631)
631. 631 Defenders, 420 F.3d at 950. [↑](#footnote-ref-632)
632. 632 Defenders II, 450 F.3d at 396. [↑](#footnote-ref-633)
633. 633 Judges O'scannlain, Kleinfeld, Tallman, Callahan, and Bea joined in the dissent. [↑](#footnote-ref-634)
634. 634 Defenders II, 450 F.3d at 402. [↑](#footnote-ref-635)
635. 635 Id. [↑](#footnote-ref-636)
636. 636 Id. at 396. [↑](#footnote-ref-637)
637. 637 Id. [↑](#footnote-ref-638)
638. 638 Id. [↑](#footnote-ref-639)
639. 639 Id. (citing 5 U.S.C. § 704 (2000)). [↑](#footnote-ref-640)
640. 640 Id. at 403 n.1 (emphasis in original). [↑](#footnote-ref-641)
641. 641 Id. at 396. [↑](#footnote-ref-642)
642. 642 Id. at 398 (citing 50 C.F.R. § 402.03 (2005)) (emphasis in original). [↑](#footnote-ref-643)
643. 643 16 U.S.C. § 1536(a)(2) (2000). [↑](#footnote-ref-644)
644. 644 467 U.S. 837 (1984) (holding that an agency's interpretation of a statute is not entitled to any deference when the statutory language is unambiguous). [↑](#footnote-ref-645)
645. 645 Defenders II, 450 F.3d at 403. [↑](#footnote-ref-646)
646. 646 541 U.S. 752 (2004). [↑](#footnote-ref-647)
647. 647 National Environmental Policy Act of 1969, 42 U.S.C.§§4321-4370e (2000). [↑](#footnote-ref-648)
648. 648 Defenders II, 450 F.3d at 399 (citing 49 U.S.C. § 13902(a)(1) (2000)). [↑](#footnote-ref-649)
649. 649 Public Citizen, 541 U.S. at 770. [↑](#footnote-ref-650)
650. 650 Defenders II, 450 F.3d at 406. [↑](#footnote-ref-651)
651. 651 437 U.S. 153 (1978). [↑](#footnote-ref-652)
652. 652 Defenders, 420 F.3d 946, at 964 (9th Cir. 2005) (quoting TVA v. Hill, 437 U.S. at 173). [↑](#footnote-ref-653)
653. 653 137 F.3d 291, 298 (5th Cir. 1998) (holding that EPA, in deciding whether to transfer CWA permitting authority to a state, may not expand the requirements of the CWA by considering section 7(a)(2) of the ESA as a tenth criterion, which a state must fulfill in addition to the nine enumerated in the CWA). [↑](#footnote-ref-654)
654. 654 962 F.2d 27 (D.C. Cir. 1992) (holding that section 7 of the ESA did not require the Federal Energy and Regulatory Commission (FERC) to either insert conditions protecting wildlife into licenses upon renewal or to enforce such conditions because language in the Federal Power Act precluded FERC from amending licenses upon renewal). [↑](#footnote-ref-655)
655. 655 Section 7(a) of the ESA provides:

     The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

     Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency … is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary … to be critical … ."

     16 U.S.C. § 1536(1)-(2) (2000). [↑](#footnote-ref-656)
656. 656 As for the circuits with which the Ninth Circuit sided, Berzon cited Defenders of Wildlife v. Envtl. Prot. Agency (Defenders of Wildlife v. EPA), 882 F.2d 1294 (8th Cir. 1989) and Conservation Law Foundation v. Andrus, 623 F.2d 712 (1st Cir. 1979). [↑](#footnote-ref-657)
657. 657 Defenders II, 420 F.3d 394, 403 (9th Cir. 2006). [↑](#footnote-ref-658)
658. 658 Endangered Species Act of 1973, 16 U.S.C.§§1531-1544 (2000). [↑](#footnote-ref-659)
659. 659 Endangered and Threatened Species; Threatened Status for Two Chinook Salmon Evolutionary Significant Units (ESUs) in California, 64 Fed. Reg. 50,394, 50,412 (Sept. 16, 1999). [↑](#footnote-ref-660)
660. 660 However, because PG&E's license expires in 2009, FERC and NMFS have begun consultation in anticipation of the renewal of the license. See 50 C.F.R. § 402.11 (2006). [↑](#footnote-ref-661)
661. 661 Endangered Species Act of 1973, 16 U.S.C § 1536(a)(2) (2000). [↑](#footnote-ref-662)
662. 662 50 C.F.R. §§402.14(g)(4), 402.14(h)(3) (2006). [↑](#footnote-ref-663)
663. 663 Id. § 402.14(h)(3). [↑](#footnote-ref-664)
664. 664 Id. § 402.14(I). [↑](#footnote-ref-665)
665. 665 Bennett v. Spear, 520 U.S. 154, 170 (1997). [↑](#footnote-ref-666)
666. 666 Federal Power Act, 16 U.S.C. § 825(1)(b) (2000). [↑](#footnote-ref-667)
667. 667 Cal. Sportfishing Prot. Alliance v. Fed. Energy Regulatory Comm'n, 472 F.3d 593, 598 (9th Cir. 2006) (citing Steamboaters v. Fed. Energy Regulatory Comm'n, 759 F.2d 1382, 1388 (9th Cir. 1985)). [↑](#footnote-ref-668)
668. 668 Cal. Sportfishing Prot. Alliance, 472 F.3d at 594 (9th Cir. 2006); 16 U.S.C. § 1536 (a)(2) (2000). [↑](#footnote-ref-669)
669. 669 437 U.S. 153 (1978). [↑](#footnote-ref-670)
670. 670 520 U.S. 154, 158 (1997). [↑](#footnote-ref-671)
671. 671 Cal. Sportfishing Prot. Alliance, 472 F.3d at 597. [↑](#footnote-ref-672)
672. 672 340 F.3d 969 (9th Cir. 2003). [↑](#footnote-ref-673)
673. 673 Id. at 977. [↑](#footnote-ref-674)
674. 674 65 F.3d 1502 (9th Cir. 1995). [↑](#footnote-ref-675)
675. 675 255 F.3d 1073 (9th Cir. 2001). [↑](#footnote-ref-676)
676. 676 Sierra Club, 65 F.3d at 1508. [↑](#footnote-ref-677)
677. 677 Envtl. Prot. Info. Ctr., 255 F.3d at 1079. [↑](#footnote-ref-678)
678. 678 456 F.3d 922 (9th Cir. 2006). [↑](#footnote-ref-679)
679. 679 Cal. Sportfishing Prot. Alliance v. Fed. Energy Regulatory Comm'n, 472 F.3d 593, 598 (9th Cir. 2006) (quoting W. Watersheds Project v. Matejko, 456 F.3d at 930 (internal quotes omitted)). [↑](#footnote-ref-680)
680. 680 30 F.3d 1050, 1052 (9th Cir. 1994). [↑](#footnote-ref-681)
681. 681 Id. at 1053. [↑](#footnote-ref-682)
682. 682 Id. [↑](#footnote-ref-683)
683. 683 50 C.F.R. § 402.02 (2006). [↑](#footnote-ref-684)
684. 684 Cal. Sportfishing Prot. Alliance, 472 F.3d at 599 (quoting 50 C.F.R. § 402.03 (2006)). [↑](#footnote-ref-685)
685. 685 The first provision gave FERC discretionary authority to require changes in operations of the project after notice and hearing. The second provision required PG&E to make changes in its operations after FERC exercised its discretionary authority under the first provision. [↑](#footnote-ref-686)
686. 686 Endangered Species Act of 1973, 16 U.S.C.§§1531-1544 (2000). [↑](#footnote-ref-687)
687. 687 Ctr. for Biological Diversity v. Kempthorne, 466 F.3d 1098, 1099 (9th Cir. 2006); see also 16 U.S.C. § 1533(b)(3)(B)(iii) (2000). [↑](#footnote-ref-688)
688. 688 Ctr. for Biological Diversity, 466 F.3d at 1100; see also 16 U.S.C. § 1533(b)(3)(B) (2000). [↑](#footnote-ref-689)
689. 689 90-Day Finding on a Petition to List the Mountain Yellow-Legged Frog as Endangered, 65 Fed. Reg. 60,603, 60,603 (Oct. 12, 2000). [↑](#footnote-ref-690)
690. 690 16 U.S.C. § 1533(b)(3)(B) (2000). [↑](#footnote-ref-691)
691. 691 Ctr. for Biological Diversity v. Norton, No. C 01-2106, 2001 WL 1602696 (N.D. Cal., Dec. 12, 2001). [↑](#footnote-ref-692)
692. 692 See 12-Month Finding for a Petition to List the Sierra Nevada Distinct Population Segment of the Mountain Yellow-Legged Frog (Rana muscosa), 68 Fed. Reg. 2,283, 2,283-2,303 (Jan. 16, 2003). [↑](#footnote-ref-693)
693. 693 Ctr. for Biological Diversity, 466 F.3d at 1100. [↑](#footnote-ref-694)
694. 694 16 U.S.C. § 1533(b)(3)(B)(iii)(I) (2000). [↑](#footnote-ref-695)
695. 695 Id. § 1533(b)(3)(B)(iii)(II). [↑](#footnote-ref-696)
696. 696 12-Month Finding for a Petition to List the Sierra Nevada Distinct Population Segment of the Mountain Yellow-Legged Frog (Rana muscosa), 68 Fed. Reg. 2,283, 2,303 (Jan. 16, 2003). [↑](#footnote-ref-697)
697. 697 Id. [↑](#footnote-ref-698)
698. 698 Review of Species that Are Candidates or Proposed for Listing as Endangered or Threatened; Annual Notice of Findings on Recycled Petitions; Annual Description of Progress on Listing Actions, 67 Fed. Reg. 40,657, 40,658 (June 13, 2002). [↑](#footnote-ref-699)
699. 699 Id.; Ctr. for Biological Diversity v. Kempthorne, 466 F.3d 1098, 1101 (9th Cir. 2006). [↑](#footnote-ref-700)
700. 700 Review of Species that Are Candidates or Proposed for Listing as Endangered or Threatened; Annual Notice of Findings on Recycled Petitions; Annual Description of Progress on Listing Actions, 67 Fed. Reg. 40,657, 40,657 (June 13, 2002). [↑](#footnote-ref-701)
701. 701 Review of Species That Are Candidates or Proposed for Listing as Endangered or Threatened; Annual Notice of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions, 69 Fed. Reg. 24,876, 24,889 (May 4, 2004). [↑](#footnote-ref-702)
702. 702 See Endangered Species Act of 1973, 16 U.S.C. § 1533(b)(3) (2000). [↑](#footnote-ref-703)
703. 703 254 F.3d 833 (9th Cir. 2001). [↑](#footnote-ref-704)
704. 704 Id. at 838 (citation omitted); see also 16 U.S.C. § 1533(b)(3)(B) (2000). [↑](#footnote-ref-705)
705. 705 See Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (stating that there are cases where a court can "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned"). [↑](#footnote-ref-706)
706. 706 332 U.S. 194 (1947). [↑](#footnote-ref-707)
707. 707 Id. at 196. [↑](#footnote-ref-708)
708. 708 16 U.S.C. § 1533(b)(3)(B) (2000). [↑](#footnote-ref-709)
709. 709 Id. § 1533(b)(3)(B)(iii). [↑](#footnote-ref-710)
710. 710 Id. § 1533(b)(3)(B). [↑](#footnote-ref-711)
711. 711 Ctr. for Biological Diversity v. Norton, 254 F.3d 833, 840 (9th Cir. 2001). [↑](#footnote-ref-712)
712. 712 16 U.S.C. § 1533(b)(3)(B)(iii)(I)-(II) (2000). [↑](#footnote-ref-713)
713. 713 Endangered Species Act of 1973, 16 U.S.C.§§1531-1544 (2000). [↑](#footnote-ref-714)
714. 714 United States List of Endangered Native Fish and Wildlife, 35 Fed. Reg. 16,047, 16,048 (Oct. 13, 1970) (codified at 50 C.F.R. pt. 17, app. D). [↑](#footnote-ref-715)
715. 715The term "take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 16 U.S.C. § 1532(19) (2000). [↑](#footnote-ref-716)
716. 716 Designation of Critical Habitat for the Unarmored Threespine Stickleback, 67 Fed. Reg. 58,580, 58,581 (Sept. 17, 2002) (codified at 50 C.F.R. pt. 17). [↑](#footnote-ref-717)
717. 717 16 U.S.C. § 1533(a)(3) (2000). [↑](#footnote-ref-718)
718. 718The [Service] … to the maximum extent prudent and determinable (A) shall, concurrently with making a determination … designate any habitat of such species which is then considered to be critical habitat; and (B) may, from time-to-time thereafter as appropriate, revise such designation." Id. [↑](#footnote-ref-719)
719. 719 Endangered Species Act (ESA) Amendments of 1982, Pub. L. No. 97-304, § 2(h)(2), 96 Stat. 1411, 16 (1982). [↑](#footnote-ref-720)
720. 720The normal inference is that each is being used in its ordinary sense - the one being permissive, the other mandatory." Haynes v. United States, 891 F2d. 235, 239-40 (9th Cir. 1989). [↑](#footnote-ref-721)
721. 721 Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., 450 F3d 930, 936 (9th Cir. 2006). [↑](#footnote-ref-722)
722. 722 Id. [↑](#footnote-ref-723)
723. 723 Id. [↑](#footnote-ref-724)
724. 724 Id.; see Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1400 (9th Cir. 1995). [↑](#footnote-ref-725)
725. 725 Administrative Procedure Act, 5 U.S.C. § 701(a)(2) (2000). [↑](#footnote-ref-726)
726. 726 Ctr. for Biological Diversity, 450 F.3d at 936-37.

     The Service "shall publish': (I) a final regulation to implement the revision, (II) a finding that the revision should not be made, (III) notice that the one-year period is being extended, or (IV) notice that the proposed revision is being withdraw together with the finding on which the withdrawal is based. [16 U.S.C. 1533(b)(6)(A)(i) (2000).] Although the Service has some discretion in selecting one of these options, it must choose one of the four.

     Id. [↑](#footnote-ref-727)
727. 727 Ctr. for Biological Diversity, 450 F.3d at 936-37 (citing 5 U.S.C. § 701(a)(2) (2000)). [↑](#footnote-ref-728)
728. 728 Id. at 937 (citing Rybachek v. U.S. Envtl. Prot. Agency, 904 F.2d 1276, 1284 (9th Cir. 1990)). [↑](#footnote-ref-729)
729. 729 Id. (citing Ariz. Cattle Growers' Ass'n v. U.S. Fish and Wildlife Serv., 273 F.3d 1229, 1236 (9th Cir. 2001)). [↑](#footnote-ref-730)
730. 730 Id. (citing Designation of Critical Habitat for the Unarmored Threespine Stickleback, 67 Fed. Reg. 58,580, 58581 (Sept. 17, 2002)). [↑](#footnote-ref-731)
731. 731 Id. [↑](#footnote-ref-732)
732. 732 Id. [↑](#footnote-ref-733)
733. 733 Id. at 938. [↑](#footnote-ref-734)
734. 734 Id. [↑](#footnote-ref-735)
735. 735 Id. (citing 16 U.S.C. § 1536(a)(2) (2000)). [↑](#footnote-ref-736)
736. 736 Id. (citing 16 U.S.C. § 1538(a)(1) (2000)). [↑](#footnote-ref-737)
737. 737 Id. [↑](#footnote-ref-738)
738. 738 Id. (quoting 16 U.S.C. § 1533(b)(2) (2000)). [↑](#footnote-ref-739)
739. 739 Id. [↑](#footnote-ref-740)
740. 740 Id. at 938. [↑](#footnote-ref-741)
741. 741 Rybachek v. U.S. Envtl. Prot. Agency, 904 F.2d. 1276, 1284 (9th Cir. 1990). [↑](#footnote-ref-742)
742. 742 5 U.S.C. § 706(2)(A) (2000). [↑](#footnote-ref-743)
743. 743 16 U.S.C. § 1533(b)(6)(A)(i)(III), (IV) (2000). [↑](#footnote-ref-744)
744. 744 Id. § 1533(b)(6)(A)(i). [↑](#footnote-ref-745)
745. 745 Ctr. for Biological Diversity, 450 F.3d at 939; see Boudette v. Barnette, 923 F.2d 754 , 756-57 (9th Cir. 1991) (noting that the expressio unius est exclusio alterius canon "creates a presumption that when a statue designates certain … manners of operation, all omissions should be understood as exclusions"). [↑](#footnote-ref-746)
746. 746 5 U.S.C. § 704 (2000). [↑](#footnote-ref-747)
747. 747 To resolve ripeness "we must consider (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." Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 733 (1998). [↑](#footnote-ref-748)
748. 748 CBD asserted that the ITS violated California law which protected the stickleback and prohibited any taking. Ctr. for Biological Diversity, 450 F.3d at 942. [↑](#footnote-ref-749)
749. 749 50 C.F.R. § 402.02 (2006). [↑](#footnote-ref-750)
750. 750 Interagency Cooperation - Endangered Species Act of 1973, as Amended; Final Rule, 51 Fed. Reg. 19,926, 19,936 (June 3, 1986). [↑](#footnote-ref-751)
751. 751 Ctr. for Biological Diversity, 450 F.3d at 942. [↑](#footnote-ref-752)
752. 752 Id. at 943. [↑](#footnote-ref-753)
753. 753 Id. at 942. [↑](#footnote-ref-754)
754. 754 Camp v. Pitts, 411 U.S. 138, 142 (1973). [↑](#footnote-ref-755)
755. 755 Ass'n of Pac. Fisheries v. Envtl. Prot. Agency, 615 F.2d 794, 811-12 (9th Cir. 1980). [↑](#footnote-ref-756)
756. 756 Sw. Ctr. for Biological Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1450 (9th Cir. 1996). [↑](#footnote-ref-757)
757. 757 Ctr. for Biological Diversity, 450 F.3d at 943 (citing Ass'n of Pac. Fisheries v. Envtl. Prot. Agency, 615 F.2d 794, 811-812 (9th Cir. 1980)). [↑](#footnote-ref-758)
758. 758 Endangered Species Act of 1973, 16 U.S.C.§§1531-1544 (2000). [↑](#footnote-ref-759)
759. 759 16 U.S.C. § 1536(a)(2). [↑](#footnote-ref-760)
760. 760 Federal Land Policy and Management Act of 1976, 43 U.S.C. §§1701-1785 (2000) (provided a uniform process for establishing a right-of-way over public lands and preserved such previously vested rights). [↑](#footnote-ref-761)
761. 761 See W. Watersheds v. Matejko, 468 F.3d 1099, 1104 (9th Cir. 2006). [↑](#footnote-ref-762)
762. 762 See 43 C.F.R. § 2801.4 (2004):

     A right of way grant issued on or before October 21, 1976, pursuant to then existing statutory authority is covered by the provisions of this part unless administration of this part diminishes or reduces any rights conferred by … the statute under which it was issued, in which event … the then existing statute shall apply.

     Id. [↑](#footnote-ref-763)
763. 763 43 C.F.R. § 2803.2(b) (2004). [↑](#footnote-ref-764)
764. 764 See W. Watersheds v. Matejko, No. 01-00259 (D. Idaho Mar. 24, 2004). [↑](#footnote-ref-765)
765. 765 See Administrative Procedure Act, 5 U.S.C. § 706(1) (2000). [↑](#footnote-ref-766)
766. 766 See W. Watersheds, No. 01-00259. [↑](#footnote-ref-767)
767. 767 See Biodiversity Legal Found. v. Badgley, 309 F.3d 1166, 1176 (9th Cir. 2002). [↑](#footnote-ref-768)
768. 768 Administrative Procedure Act, 5 U.S.C.§§551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5362, 7521 (2000). [↑](#footnote-ref-769)
769. 769 See Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv., 340 F.3d 969, 973 (9th Cir. 2003) ("Under the APA, a court may set aside an agency action if the court determines that the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.'" (quoting the APA, 5 U.S.C. § 706(2)(A)). [↑](#footnote-ref-770)
770. 770 Endangered Species Act of 1973, 16 U.S.C. § 1536(a)(2) (2000). [↑](#footnote-ref-771)
771. 771 Id. [↑](#footnote-ref-772)
772. 772 Id. [↑](#footnote-ref-773)
773. 773 See, e.g., 16 U.S.C. § 1540(g)(1)(C) (2000) (authorizing citizen suits "where there is alleged a failure of the Secretary to perform any act or duty … which is not discretionary[.]"). [↑](#footnote-ref-774)
774. 774 See 50 C.F.R. § 402.02 (2004) (Defining "action" as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States … ."). [↑](#footnote-ref-775)
775. 775 Id. (emphasis added). [↑](#footnote-ref-776)
776. 776 Id. (providing as examples of action "the promulgation of regulations" and "the granting of … rights-of-way.") [↑](#footnote-ref-777)
777. 777 See Natural Res. Def. Council v. Houston, 146 F.3d 1118, 1125 (9th Cir. 1998). [↑](#footnote-ref-778)
778. 778 See Defenders of Wildlife v. EPA, 420 F.3d 946 (9th Cir. 2005) (emphasizing that under ESA section 7(a)(2) only "affirmative" acts are "actions," while providing that a failure to act necessarily falls outside the scope of this definition). [↑](#footnote-ref-779)
779. 779 See Sierra Club v. Babbitt, 65 F.3d 1502, 1511 (9th Cir. 1995) (reasoning that "a BLM "action' will implicate section 7(a)(2) only if it legitimately authorizes [private] activity" and concluding that the BLM's issuance of an "approval" letter for a road right-of-way could not be construed as an "authorization" triggering a duty to consult). See also Marbled Murelet v. Babbitt, 83 F.3d 1068, 1074-75 (9th Cir. 1996) (finding section 7(a)(2) inapplicable where the responding agency "merely provided advice" on how to avoid a "take" but did not act to "authorize, fund or carry out" challenged tree-harvesting operations). [↑](#footnote-ref-780)
780. 780 See Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv., 340 F.3d 969, 977 (9th Cir. 2003) (holding that section 7(a)(2) applies to the "continued issuance of fishing permits"). See also Natural Res. Def. Council v. Houston, 146 F.3d 1118, 1125-26 (9th Cir. 1998) (reasoning that section 7(a)(2) applies to negotiating and executing water contracts, where agency was not bound to reaffirm previously negotiated terms). [↑](#footnote-ref-781)
781. 781 Defenders of Wildlife, 420 F.3d at 968 (citing Wash. Toxics Coal. v. Envtl. Prot. Agency, 413 F.3d 1024, 1033 (9th Cir. 2005)). [↑](#footnote-ref-782)
782. 782 See 50 C.F.R. § 402.03 (2004) ("Section 7 and the requirements of this Part apply to all actions in which there is discretionary Federal involvement or control."). [↑](#footnote-ref-783)
783. 783 Defenders of Wildlife, 420 F.3d at 969 (emphasis added). [↑](#footnote-ref-784)
784. 784 See Envtl. Prot. Info. Ctr. v. Simpson Timber Co., 255 F.3d 1073, 1082 (9th Cir. 2001) (no ongoing agency involvement where the FWS had issued a permit without retaining authority to amend it to protect endangered species). [↑](#footnote-ref-785)
785. 785 See Sierra Club v. Babbitt, 65 F.3d 1502, 1509 (9th Cir. 1995) (providing that section 7(a)(2) did not apply where BLM had no authority to influence actions based on a right-of-way established before ESA enactment). [↑](#footnote-ref-786)
786. 786 See Wash. Toxics Coal. v. Envt'l Prot. Agency, 413 F.3d 1024, 1033 (Under Federal Insecticide, Fungicide, and Rodenticide Act, EPA had a continuing duty "to register pesticides, alter pesticide registrations, and cancel pesticide registrations."). [↑](#footnote-ref-787)
787. 787 See Pac. Rivers Council v. Thomas, 30 F.3d 1050, 1053 (9th Cir. 1994) (USFS had ongoing authority under a management plan still in effect.). [↑](#footnote-ref-788)
788. 788 See Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv., 340 F.3d 969, 977 (9th Cir. 2003) (NMFS had continuing authority where it retained discretion to protect species in its permits.). [↑](#footnote-ref-789)
789. 789 See 43 U.S.C. § 1733 (2000); 43 C.F.R. § 2808.11 (2005) (providing BLM ability to bring enforcement or trespass actions if a right-of-way holder "substantially deviates" without BLM approval). See also 16 U.S.C. § 1538 (2000) (providing BLM ability to bring an ESA § 9 taking action to prevent harm). [↑](#footnote-ref-790)
790. 790 See 70 Fed. Reg. 20,970 (Apr. 22, 2005) (After the district court decision, BLM significantly amended its right-of-way regulations.). [↑](#footnote-ref-791)
791. 791 43 C.F.R. § 2803.2(b) (2004). [↑](#footnote-ref-792)
792. 792 50 C.F.R. § 402.03 (2004). [↑](#footnote-ref-793)
793. 793 See Marbled Murelet v. Babbitt, 83 F.3d 1068, 1074 (9th Cir. 1996) ("there is no evidence that the USFWS had any power to enforce those conditions other than its authority under section 9 of the ESA, and this is not enough to trigger "federal action' under section 7"). [↑](#footnote-ref-794)
794. 794 See Administrative Procedure Act, 5 U.S.C. § 706(1) (2000). [↑](#footnote-ref-795)
795. 795 See Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 891 (1990) ("Under the terms of the APA, the respondent must direct its attack against some particular "agency action' that causes it harm."). [↑](#footnote-ref-796)
796. 796 See S. Utah Wilderness Alliance v. Norton, 542 U.S. 55, 64 (2004). [↑](#footnote-ref-797)
797. 797 467 U.S. 837 (1984). [↑](#footnote-ref-798)
798. 798 Endangered Species Act of 1973, 16 U.S.C.§§1531-1544 (2000). [↑](#footnote-ref-799)
799. 799 Id. § 1533. [↑](#footnote-ref-800)
800. 800 Id. [↑](#footnote-ref-801)
801. 801 Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv., 475 F.3d 1137 (9th Cir. 2007) (quoting 16 U.S.C. § 1533(b)(3)(A)). [↑](#footnote-ref-802)
802. 802 16 U.S.C. § 1533(b)(3)(B). [↑](#footnote-ref-803)
803. 803 Nw. Ecosystem Alliance, 475 F.3d at 1138 (quoting 16 U.S.C. § 1532(16)) (emphasis in original). [↑](#footnote-ref-804)
804. 804 Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4722 (Feb 7, 1996) [hereinafter DPS Policy]. [↑](#footnote-ref-805)
805. 805 Nw. Ecosystem Alliance, 475 F.3d at 1138 (citing DPS Policy, supra note 8, at 4725). [↑](#footnote-ref-806)
806. 806 Id. [↑](#footnote-ref-807)
807. 807 Id. at 1140. [↑](#footnote-ref-808)
808. 808 United States v. City of Tacoma, 332 F.3d 574, 578 (9th Cir. 2003). [↑](#footnote-ref-809)
809. 809 Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2000). [↑](#footnote-ref-810)
810. 810 Under the famous Chevron two-step test analysis, a court first looks at whether Congress has spoken clearly on the issue. Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 842-44 (1984). If the statute is clear, the agency's interpretation is secondary to Congress' expressed intent, but if the statute is ambiguous, the agency's interpretation is entitled to deference if reasonable. Id. at 843. [↑](#footnote-ref-811)
811. 811 United States v. Mead Corp., 533 U.S. 218, 220 (2001). [↑](#footnote-ref-812)
812. 812 Nw. Ecosystem Alliance, 475 F.3d at 1142 (citing Mead, 533 U.S. at 234). [↑](#footnote-ref-813)
813. 813 Id. at 1143. [↑](#footnote-ref-814)
814. 814 Id. [↑](#footnote-ref-815)
815. 815 Id. at 1144. [↑](#footnote-ref-816)
816. 816 Id. [↑](#footnote-ref-817)
817. 817 Nat'l Ass'n of Home Builders v. Norton, 340 F.3d 835, 841 (9th Cir. 2003). [↑](#footnote-ref-818)
818. 818 Nw. Ecosystem Alliance, 475 F.3d at 1146. [↑](#footnote-ref-819)
819. 819 Id. [↑](#footnote-ref-820)
820. 820 Id. at 1150. [↑](#footnote-ref-821)
821. 821 Endangered Species Act of 1973, 16 U.S.C.§§1531-1544 (2000). [↑](#footnote-ref-822)
822. 822 See infra notes 839-40 and accompanying text. [↑](#footnote-ref-823)
823. 823 16 U.S.C. § 1536(a)(2) (2000). Under the ESA, if any listed threatened or endangered species may be present in the area of an agency's proposed action, the agency must conduct a biological assessment to determine whether the proposed action will impact the species. Id. § 1536(c)(1); see also 50 C.F.R. § 402.02 (2006). If the agency finds that the proposed action may affect the species or critical habitat, the agency must consult with FWS or National Marine Fisheries Service. Id. § 402.14. [↑](#footnote-ref-824)
824. 824 Id. § 1538(a)(1)(B) (2000). The term "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." Id. § 1532(19). [↑](#footnote-ref-825)
825. 825 16 U.S.C. § 1539 (2000). [↑](#footnote-ref-826)
826. 826 Or. Natural Res. Council v. U.S. Fish & Wildlife Serv. (ONRC), 476 F.3d 1031, 1034 (9th Cir. 2007) (citing 16 U.S.C. §§1536(b)(4), (o) (2000); Ariz. Cattle Growers' Ass'n. v. U.S. Fish & Wildlife Serv., 273 F.3d 1229, 1233 (9th Cir. 2001)). [↑](#footnote-ref-827)
827. 827 50 C.F.R. § 402.14(i)(3) (2006). [↑](#footnote-ref-828)
828. 828 ONRC, 476 F.3d at 1034-35 (citing 50 C.F.R.§§402.14(i)(4), 402.16(a) (2006)).

     The action agency must also reinitiate consultation with the FWS if: (1) new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (2) a modification to the action affects listed species or critical habitat in a way that was not considered in the BiOp; or (3) newly listed species or newly designated critical habitat may be affected by the identified action.

     ONRC, 476 F.3d at 1035 n.5 (citing 50 C.F.R. § 402.16(b)-(d) (2006)). [↑](#footnote-ref-829)
829. 829 In this case, the Agencies conducted a biological assessment and found that the timber sales might affect the northern spotted owl and three other listed species. [↑](#footnote-ref-830)
830. 830The BiOp found that the proposed timber harvest would remove 22,227 acres of forest designated as spotted owl suitable habitat (i.e. habitat suitable for nesting, roosting and/or foraging). The timber harvest would impact 10,443 acres of spotted owl critical habitat, removing or downgrading 5383 acres of nesting, roosting and foraging critical habitat, degrading 2168 acres of nesting, roosting and foraging critical habitat, removing 563 acres of dispersal critical habitat and degrading 2329 acres of dispersal habitat." ONRC, 476 F.3d at 1034. [↑](#footnote-ref-831)
831. 831 50 C.F.R. § 17.11(h) (2006). [↑](#footnote-ref-832)
832. 832 ONRC, 476 F.3d at 1034. [↑](#footnote-ref-833)
833. 833 Id. at 1037. [↑](#footnote-ref-834)
834. 834 Id. at 1039. [↑](#footnote-ref-835)
835. 835 378 F.3d 1059 (9th Cir. 2004). [↑](#footnote-ref-836)
836. 836 ONRC, 476 F.3d at 1035 (citing Gifford, 378 F.3d at 1069 (emphasis in original)). [↑](#footnote-ref-837)
837. 837 ONRC, 476 F.3d at 1035. [↑](#footnote-ref-838)
838. 838 N. Alaska Envtl. Ctr. v. Kempthorne, 457 F.3d 969, 975 (9th Cir. 2006). [↑](#footnote-ref-839)
839. 839 Administrative Procedure Act, 5 U.S.C.§§704, 706 (2000). [↑](#footnote-ref-840)
840. 840 ONRC, 476 F.3d at 1036. [↑](#footnote-ref-841)
841. 841 Id. at 1037-38. [↑](#footnote-ref-842)
842. 842 Id. at 1038-39. [↑](#footnote-ref-843)
843. 843 Id. at 1037. [↑](#footnote-ref-844)
844. 844 Id. at 1041. [↑](#footnote-ref-845)
845. 845 Id. at 1039 (citing Ariz. Cattle Growers' Ass'n. v. U.S. Fish & Wildlife Serv., 273 F.3d 1229, 1250-51 (9th Cir. 2001)). [↑](#footnote-ref-846)
846. 846 ONRC, 476 F.3d at 1037. [↑](#footnote-ref-847)
847. 847 Id. at 1039. [↑](#footnote-ref-848)
848. 848 Gros Ventre Tribe v. United States, 344 F. Supp. 2d 1221 (D. Mont. 2004). [↑](#footnote-ref-849)
849. 849 Administrative Procedure Act, 5 U.S.C.§§551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5362, 7521 (2000). [↑](#footnote-ref-850)
850. 850 Treaty of Fort Laramie, Sept. 17, 1851, 11 Stat. 749 (providing that seven Indian nations, including the Gros Ventre and Assiniboine had "assembled for the purpose of establishing and confirming peaceful relations amongst themselves" and "agreed to abstain in future from all hostilities whatever against each other, to maintain good faith and friendship in all their mutual intercourse, and to make an effective and lasting peace," while recognizing "the right of the United States Government to establish roads, military and other posts, within their respective territories." The United States agreed in return to "protect the … Indian nations against the commission of all depredations by the people of the said United States."); see also Montana v. United States, 450 U.S. 544, 553 (1981) (providing that instead of conveying land to the Indians, the Treaty of Fort Laramie "chiefly represented a covenant among several tribes which recognized specific boundaries for their respective territories"). [↑](#footnote-ref-851)
851. 851 Treaty with the Blackfeet, Oct. 17, 1855, 11 Stat. 657 (providing that the Tribes "agreed that citizens of the United States may live in and pass unmolested through the countries respectively occupied and claimed by them," while the United States consented to be "bound to protect said Indians against depredations and other unlawful acts which white men residing in or passing through their country may commit"). [↑](#footnote-ref-852)
852. 852 See An Act to Ratify and Confirm an Agreement with the Gros Ventre, May 1, 1888, ch. 213, 25 Stat. 113 . [↑](#footnote-ref-853)
853. 853 Agreement with the Indians of the Fort Belknap Indian Reservation in Montana, 1895, 29 Stat. 350; see also S. Doc. No. 54-117, at 3-4 (1896) (providing that the government negotiators had told the Tribes that they "would not be giving up any of their timber or grasslands … and that they would have ample water for all their needs"). [↑](#footnote-ref-854)
854. 854 See Island Mountain Protectors, 144 I.B.L.A. 168 (1998) (holding that the 1996 ROD violated the government's tribal trust obligations, NEPA, and FLPMA). [↑](#footnote-ref-855)
855. 855 National Environmental Policy Act of 1969, 42 U.S.C.§§4321-4370e (2000). [↑](#footnote-ref-856)
856. 856 Federal Land Policy and Management Act of 1976, 43 U.S.C. §§1701-1785 (2000). [↑](#footnote-ref-857)
857. 857 Buono v. Norton, 371 F.3d 543, 545 (9th Cir. 2004). [↑](#footnote-ref-858)
858. 858 Muckleshoot Tribe v. Lummi Indian Tribe, 141 F.3d 1355, 1358 (9th Cir. 1998). [↑](#footnote-ref-859)
859. 859 See 5 U.S.C. § 704 (2000). [↑](#footnote-ref-860)
860. 860 See id. § 702. [↑](#footnote-ref-861)
861. 861 Compare Gallo Cattle Co. v. U.S. Dep't of Agric., 159 F.3d 1194 (9th Cir. 1998) (concluding that "the APA's waiver of sovereign immunity contains several limitations" among them the final agency action requirement of § 704) with The Presbyterian Church (U.S.A.) v. United States, 870 F.2d 518 (9th Cir. 1989) (concluding that "agency action" under the APA is not a condition to the sovereign immunity waiver under § 702, and therefore "final agency action" under the APA cannot be a requirement for the sovereign immunity waiver under § 702). [↑](#footnote-ref-862)
862. 862 Gros Ventre Tribe v. United States, 469 F.3d 801, 809 (9th Cir. 2006). [↑](#footnote-ref-863)
863. 863 Id. at 810 (quoting United States v. Mitchell, 463 U.S. 206, 225 (1983) (quoting Seminole Nation v. United States, 316 U.S. 286, 296 (1942))). [↑](#footnote-ref-864)
864. 864 See, e.g., Shoshone-Bannock Tribes v. Reno, 56 F.3d 1476, 1482 (D.C. Cir. 1995) (providing that "an Indian tribe cannot force the government to take a specific action unless a treaty, statute or agreement imposes, expressly or by implication, that duty"). [↑](#footnote-ref-865)
865. 865 667 F.2d 931 (10th Cir. 1982). [↑](#footnote-ref-866)
866. 866 Id. at 934. [↑](#footnote-ref-867)
867. 867 56 F.3d 1476 (D.C. Cir. 1995). [↑](#footnote-ref-868)
868. 868 See Treaty of Fort Bridger, 1868, 15 Stat. 673 . [↑](#footnote-ref-869)
869. 869 See Shoshone-Bannock Tribes v. Reno, 56 F.3d at 1478, 1482 (providing that the broad treaty provision protecting the tribes' hunting rights "did not suggest in the slightest that upon the Tribes' request, the United States is bound to file and defend meritless claims to water rights," and, "without an unambiguous provision by Congress that clearly outlines a federal trust responsibility, courts must appreciate that whatever fiduciary obligation otherwise exists … it is a limited one only"). [↑](#footnote-ref-870)
870. 870 Cf. United States v. Mason, 412 U.S. 391, 393, 398, 400 (1973) (indicating that the United States had not breached its fiduciary duty in managing an Osage Tribe member's allotted land that it held in trust); Seminole Nation v. United States, 316 U.S. 296, 296-300 (1942) (indicating that in its stewardship of Indian annuities, the United States may have violated its fiduciary duty); Minnesota v. United States, 305 U.S. 382, 386 (1939) (providing that "the owner of the fee of the Indian allotted lands holds the same in trust for the allottees"). [↑](#footnote-ref-871)
871. 871 445 U.S. 535 (1980). [↑](#footnote-ref-872)
872. 872 See id. at 542, 545 (providing that General Allotment Act did not "unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands," and that the legislative history did not indicate that Congress meant for "the Government to manage timber resources for the benefit of Indian allottees"). [↑](#footnote-ref-873)
873. 873 See Morongo Band of Mission Indians v. Fed. Aviation Admin., 161 F.3d 569, 574 (9th Cir. 1998) (providing that when the Morongo Band of Mission Indians sought equitable relief under the APA, the Ninth Circuit indicated that while "the United States does owe a general trust responsibility to Indian tribes, unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes"); see also N. Slope Borough v. Andrus, 642 F.2d 589, 612 (D.C. Cir. 1980) (providing "without an unambiguous provision by Congress that clearly outlines a federal trust responsibility, courts must appreciate that whatever fiduciary obligation otherwise exists, it is a limited one only"). [↑](#footnote-ref-874)
874. 874 See Mitchell, 445 U.S. at 542. [↑](#footnote-ref-875)
875. 875 Gros Ventre Tribe v. United States, 469 F.3d 801, 813 (9th Cir. 2006). [↑](#footnote-ref-876)
876. 876 455 F.3d 974 (9th Cir. 2006). [↑](#footnote-ref-877)
877. 877 Gros Ventre, 469 F.3d at 813 (quoting Marceau v. Blackfeet Hous. Auth., 455 F.3d 974, 984 (9th Cir. 2006) (emphasis added)); see also Gros Ventre Tribe, 469 F.3d at 813 (providing "fiduciary duties arise under Mitchell only where the federal government pervasively regulates a tribally-owned resource"); Inter Tribal Council of Arizona, Inc. v. Babbitt, 51 F.3d 199, 203 (9th Cir. 1995) (finding no fiduciary duty like that in Mitchell because "the off-reservation school was not part of Indian lands, but was merely allocated by the BIA for use by the Tribes"). [↑](#footnote-ref-878)
878. 878 5 U.S.C. § 706(1) (2000). [↑](#footnote-ref-879)
879. 879 See Ctr. for Biological Diversity v. Veneman, 394 F.3d 1108, 1111 (9th Cir. 2005) (providing that there is not a private cause of action under FLPMA, and that FLPMA is mainly a procedural statute). [↑](#footnote-ref-880)
880. 880 542 U.S. 55 (2004). [↑](#footnote-ref-881)
881. 881 Id. at 64. [↑](#footnote-ref-882)
882. 882 Id. at 66. [↑](#footnote-ref-883)
883. 883 See San Carlos Apache Tribe v. United States, 417 F.3d 1091, 1098-99 (9th Cir. 2005) (providing that § 106 of the NHPA includes no implied right of action); Turtle Island Restoration Network v. U.S. Dep't of Commerce, 438 F.3d 937, 942 (9th Cir. 2006) (providing that there is no private right of action under NEPA). [↑](#footnote-ref-884)
884. 884 See Wind River Mining Corp. v. United States, 946 F.2d 710, 712-13 (9th Cir. 1991) (providing that the "general six-year statute of limitations for civil actions brought against the United States, see 28 U.S.C. § 2401(a), applies to actions for judicial review brought pursuant to the Administrative Procedure Act [APA]."). [↑](#footnote-ref-885)
885. 885 See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (providing that at a minimum standing requires 1) actual injury, 2) the challenged action caused the alleged injury, and 3) a possibility that a favorable decision will redress the injury). [↑](#footnote-ref-886)
886. 886 Gros Ventre Tribe v. United States, 469 F.3d 801, 815 (9th Cir. 2006). [↑](#footnote-ref-887)
887. 887 See Scholastic Entm't, Inc. v. Fox Entm't Group, Inc., 336 F.3d 982, 985 (9th Cir. 2003). [↑](#footnote-ref-888)
888. 888 Cf. id. (providing that because the parties had briefed the issues beforehand, the district court's sua sponte dismissal for lack of jurisdiction did not violate appellant's right to due process). [↑](#footnote-ref-889)
889. 889 Calpine Corporation was a nominal defendant. [↑](#footnote-ref-890)
890. 890 National Environmental Policy Act of 1969, 42 U.S.C.§§4321-4370f (2000). [↑](#footnote-ref-891)
891. 891 16 U.S.C. §§470-470x-6 (2000). [↑](#footnote-ref-892)
892. 892 16 U.S.C. §§1600-1614 (2000). [↑](#footnote-ref-893)
893. 893 5 U.S.C. § 701 et seq. (2000). [↑](#footnote-ref-894)
894. 894 Pit River Tribe v. Bureau of Land Mgmt. (Pit River Tribe I), 306 F. Supp. 2d 929, 952 (E.D. Cal. 2004). [↑](#footnote-ref-895)
895. 895 30 U.S.C. §§1001-1027 (2000). [↑](#footnote-ref-896)
896. 896 Id. § 1002. [↑](#footnote-ref-897)
897. 897 Pit River Tribe v. U.S. Forest Serv. (Pit River Tribe II), 469 F.3d 768, 773 (9th Cir. 2006). [↑](#footnote-ref-898)
898. 898 Id. [↑](#footnote-ref-899)
899. 899 Id. [↑](#footnote-ref-900)
900. 900 Id. [↑](#footnote-ref-901)
901. 901 Id. at 774. [↑](#footnote-ref-902)
902. 902 Id. [↑](#footnote-ref-903)
903. 903 Id. [↑](#footnote-ref-904)
904. 904 Id. at 775. [↑](#footnote-ref-905)
905. 905 Id. at 786 (emphasis omitted). [↑](#footnote-ref-906)
906. 906 Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996). [↑](#footnote-ref-907)
907. 907 Pit River Tribe II, 469 F.3d at 778. [↑](#footnote-ref-908)
908. 908 Pit River Tribe I, 306 F. Supp. 2d 929, 952 (E.D. Cal. 2004). [↑](#footnote-ref-909)
909. 909 Westland Water Dist. v. U.S. Dep't of Interior, 376 F.3d 853, 865 (9th Cir. 2004). [↑](#footnote-ref-910)
910. 910 Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2000). [↑](#footnote-ref-911)
911. 911 See Energy Policy Act of 2005, Pub. L. No. 109-58,§§231(1), (2), 119 Stat. 594, amending 30 U.S.C. § 1005(g). [↑](#footnote-ref-912)
912. 912 See Bennett v. Spear, 520 U.S. 154, 167 (1997). [↑](#footnote-ref-913)
913. 913 Pit River Tribe II, 469 F.3d 768, 779 (9th Cir. 2006). [↑](#footnote-ref-914)
914. 914 Id. at 779 (citing Cantrell v. City of Long Beach, 241 F.3d 674, 682 (9th Cir. 2001)). [↑](#footnote-ref-915)
915. 915 30 U.S.C. § 1005(g)(1) (2006) (repealed by Pub. L. No. 109-58 § 231(1) [119 Stat. 668] Aug. 8, 2005). [↑](#footnote-ref-916)
916. 916 30 U.S.C.A. § 1005(a) (West 2006) (emphasis added). [↑](#footnote-ref-917)
917. 917 Pit River Tribe II, 469 F.3d at 780. [↑](#footnote-ref-918)
918. 918 See Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 768 (2004). [↑](#footnote-ref-919)
919. 919 511 U.S. 244 (1994). [↑](#footnote-ref-920)
920. 920 Id. at 280. [↑](#footnote-ref-921)
921. 921 Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976). [↑](#footnote-ref-922)
922. 922 Conner v. Burford, 848 F.2d 1441, 1446 (9th Cir. 1988). [↑](#footnote-ref-923)
923. 923 Id. at 1451. [↑](#footnote-ref-924)
924. 924 Id. [↑](#footnote-ref-925)
925. 925 Id. at 1443-44. [↑](#footnote-ref-926)
926. 926 Id. at 1451 (citation omitted). [↑](#footnote-ref-927)
927. 927 Pit River Tribe II, 469 F.3d 768, 782 (9th Cir. 2006) (citing Friends of Se.'s Future v. Morrison, 153 F.3d 1059, 1063-64 (9th Cir. 1998)). [↑](#footnote-ref-928)
928. 928 Id. at 782-83. [↑](#footnote-ref-929)
929. 929 Id. at 783. [↑](#footnote-ref-930)
930. 930 Id. [↑](#footnote-ref-931)
931. 931 Sierra Club v. Hathaway, 579 F.2d 1162, 1164 (9th Cir. 1978). [↑](#footnote-ref-932)
932. 932 Id. at 1168. [↑](#footnote-ref-933)
933. 933 Id. at 1167. [↑](#footnote-ref-934)
934. 934 Nat'l Wildlife Fed'n v. Espy, 45 F.3d 1337, 1344 (9th Cir. 1995). [↑](#footnote-ref-935)
935. 935 Conner, 848 F.2d 1441, 1446 (9th Cir. 1998) (quoting Sierra Club v. Peterson, 717 F.2d 1409, 1414 (D.C.Cir.1983)). [↑](#footnote-ref-936)
936. 936 40 C.F.R. § 1502.5 (2005). [↑](#footnote-ref-937)
937. 937 840 F.2d at 714, 718-19. [↑](#footnote-ref-938)
938. 938 214 F.3d 1135 (9th Cir. 2000). [↑](#footnote-ref-939)
939. 939 Id. at 1143. [↑](#footnote-ref-940)
940. 940 Pit River Tribe II, 469 F.3d 768, 787 (9th Cir. 2006). [↑](#footnote-ref-941)
941. 941 See Pit River Tribe I, 306 F. Supp. 2d 929, 945-46 & n.10 (E.D. Cal 2004) (explaining that the extension of the leases was exempt from NEPA and NHPA). [↑](#footnote-ref-942)
942. 942 United States v. 0.95 Acres of Land, 994 F.2d 696, 698 (9th Cir. 1993). [↑](#footnote-ref-943)
943. 943 Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 806 (9th Cir. 1999). [↑](#footnote-ref-944)
944. 944 36 C.F.R. § 800.1(c) (2005). [↑](#footnote-ref-945)
945. 945 Inter Tribal Council of Ariz., Inc. v. Babbit, 51 F.3d 199, 203 (9th Cir. 1995). [↑](#footnote-ref-946)
946. 946 Morango Band of Mission Indians v. Fed. Aviation Admin. (Morango Band of Mission Indians v. FAA) 161 F.3d 569, 574 (9th Cir. 1998). [↑](#footnote-ref-947)
947. 947 Pit River Tribe II, 469 F.3d 768, 788 (9th Cir. 2006). [↑](#footnote-ref-948)
948. 948 16 U.S.C. §§1801-1883 (2000). [↑](#footnote-ref-949)
949. 949 The Magnuson Act established eight Regional Fishery Management Councils, including the PFMC. Id. § 1852(a)(1)(A)-(H). The Councils are made up of federal and state officials and private experts appointed by NMFS who draft "fishery management plans" (FMPs) and regulations implementing these FMPs. Id. § 1852(h)(1); id. § 1853(c). [↑](#footnote-ref-950)
950. 950 See United States v. Washington, 774 F.2d 1470, 1473 n.2 (9th Cir. 1985) (explaining that "for natural stocks, the escapement goal is defined as the number of spawning adults needed to produce the maximum number of juvenile salmon that, after incubation and freshwater rearing, will out-migrate to the sea"). [↑](#footnote-ref-951)
951. 951 On May 4, 1989, PFMC adopted an amendment to the Pacific Plan that set its spawner escapement goal at "35 percent of the potential adults from each brood of natural spawners, but no fewer than 35,000 naturally spawning adults in any given year." 54 Fed. Reg. 19,194 (May 4, 1989) (to be codified at 50 C.F.R. pt. 661); see Ocean Salmon Fisheries off the Coasts of Washington, Oregon, and California, 54 Fed. Reg. 19,800 (May 8, 1989) (to be codified at 50 C.F.R. pt. 661) (lowering the percentage from 34% to 33%). [↑](#footnote-ref-952)
952. 952 See Fisheries off West Coast States and in the Western Pacific, 70 Fed. Reg. 23,054, 23,054-56 (May 4, 2005) (to be codified at 50 C.F.R. pt. 660) (explaining how NMFS adopted the 2005 plan). [↑](#footnote-ref-953)
953. 953 See 5 U.S.C. § 553(b)(B) (2000) (explaining that notice or hearing can be dispensed with "when the agency for good cause finds … that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest"). [↑](#footnote-ref-954)
954. 954 See Or. Trollers Ass'n v. Gutierrez, No. 05-6165, 2005 WL 2211084 at 8 (D. Or. Sept. 8, 2005). [↑](#footnote-ref-955)
955. 955 See id. (explaining that the claims would fail on their merits). [↑](#footnote-ref-956)
956. 956 See Oja v. U.S. Army Corps of Eng'rs, 440 F.3d 1122, 1127 (9th Cir. 2006) (explaining that the appropriate standard of review for whether a "cause of action accrues and whether it is barred by the statute of limitations" is de novo). [↑](#footnote-ref-957)
957. 957 See Fisheries off West Coast States and in the Western Pacific, 70 Fed. Reg. 23,054-56 (explaining how NMFS adopted the 2005 plan). [↑](#footnote-ref-958)
958. 958 See Pub. L. No. 94-265, 90 Stat. 354 (1976). [↑](#footnote-ref-959)
959. 959 See 16 U.S.C. § 1855(f)(1)-(2) (2000) (explaining review for actions). [↑](#footnote-ref-960)
960. 960 See Kramer v. Mosbacher, 878 F.2d 134, 137 (4th Cir. 1989) (construing strictly the 30 day period in the pre-1990 version of § 1855(f)(1) to determine that a challenge to a fishery quota regulation was not timely because, although it was filed within thirty days of the Secretary of Commerce's action to close the fishery, the 30 day period actually started following the publication of the regulation four months earlier). Congress amended § 1855(f)(1) in 1990 to include agency actions as "a direct response to a portion of the decision of the Fourth Circuit Court of Appeals in Kramer." H.R. Rep. No. 101-393, at 28 (1990). [↑](#footnote-ref-961)
961. 961 112 F.3d 414, 416 (9th Cir. 1997) (explaining the effect that section 1855(f)(1) has on a district court's ability "to hear an attack on the regulations if review is not sought within 30 days of their promulgation"). [↑](#footnote-ref-962)
962. 962Actions" are defined in section 1855(f)(2) as "actions that are taken by the Secretary under regulations which implement a fishery management plan, including but not limited to actions that establish the date of closure of a fishery to commercial or recreational fishing." 16 U.S.C. § 1855(f)(2) (2000). [↑](#footnote-ref-963)
963. 963NMFS will annually establish … management specifications … by publishing the action in the Federal Register under § 660.411." 50 C.F.R. § 660.408(a) (2005). Management specifications include modifications of fishing seasons for the "protection of depressed stocks present in the fishing areas." Id. § 660.408(h)(2). Hence, the court considered the 2005 management measures to be management specifications and, therefore, actions. [↑](#footnote-ref-964)
964. 964 Section 660.411 states that "annual and certain other actions … will be implemented by an action published in the Federal Register." Id. § 660.411(a) (emphasis added). When NMFS published the 2005 management measures in the Federal Register they also invoked the "good cause" exception to the notice-and-comment requirement that applies to "any action" under section 660.411. See Instream Notice Procedures: Classification, 70 Fed. Reg. 23,063 (May 4, 2005). [↑](#footnote-ref-965)
965. 965 467 U.S. 837 (1984). [↑](#footnote-ref-966)
966. 966 Id. at 842-43. [↑](#footnote-ref-967)
967. 967 16 U.S.C. § 1855(f)(1) (2000) (adopting APA, 5 U.S.C. § 706(2)(A) (2000)). [↑](#footnote-ref-968)
968. 968 Motor Vehicles Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (citing Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)). [↑](#footnote-ref-969)
969. 969 16 U.S.C. § 1802(37) (2000). [↑](#footnote-ref-970)
970. 970 Id. § 1851(a)(2). [↑](#footnote-ref-971)
971. 971 Id. § 1851(a)(3). [↑](#footnote-ref-972)
972. 972Fishery" had previously been defined as "one or more stock of fish which can be treated as a unit for purposes of conservation and management." Id. § 1802(13) (emphasis added). A "stock of fish" is defined as "a species, subspecies, geographical grouping or other category of fish capable of management as a unit." Id. § 1802(37) (emphasis added). [↑](#footnote-ref-973)
973. 973 A "category" is "any of several fundamental and distinct classes to which entities or concepts belong" or "a division within a system of classification." Merriam Webster's Collegiate Dictionary 180 (10th ed. 1998). [↑](#footnote-ref-974)
974. 974 See, e.g., 70 Fed. Reg. 37,204, 37,208 (June 28, 2005) (adopting hatchery policy under the ESA). [↑](#footnote-ref-975)
975. 975 See, e.g., Hatchery Scientific Review Group, Hatchery Reform: Principles and Recommendations A-15 (Apr. 2004), available at http://www.longlivethekings.org/pdf/hsrg/HSRG Scientific Framework.pdf (outlining how "biological processes shape the biological significance and viability of both hatchery and naturally-spawning populations"); Hatchery Scientific Review Group, Hatchery Reform: Report to Congress 35 (Mar. 2006), available at http://www.lltk.org/pdf/hrp/report to congress06/HR Report to Congress Mar06.pdf (arguing that "hatchery operations should be designed so that the natural environment is the driving force in determining the genetic make-up of nature stocks within … watersheds"); Hatchery Scientific Review Group, Hatchery Reform in Washington State: Principles and Emerging Issues, Fisheries Magazine, June 2005, at 12. [↑](#footnote-ref-976)
976. 976 16 U.S.C. § 1802(37) (2000). [↑](#footnote-ref-977)
977. 977 50 C.F.R. § 600.320(d)(1) (2005). [↑](#footnote-ref-978)
978. 978 Pub. L. No. 104-143, 110 Stat. 1338 (1996). [↑](#footnote-ref-979)
979. 979 Or. Trollers Ass'n v. Gutierrez, No. 05-6165, 2005 WL 2211084, at 8 (D. Or. Sept. 8, 2005). [↑](#footnote-ref-980)
980. 980 Endangered Species Act of 1973, 16 U.S.C. § 1531(b) (2000); Alsea Valley Alliance v. Evans, 161 F. Supp. 2d 1154 (D. Or. 2001). [↑](#footnote-ref-981)
981. 981 Alliance Against IFQs v. Brown, 84 F.3d 343, 350 (9th Cir. 1996). [↑](#footnote-ref-982)
982. 982 16 U.S.C. § 1851(a)(2) (2000). [↑](#footnote-ref-983)
983. 983 See, e.g., id.§§1801(b)(4), 1851(a)(1). [↑](#footnote-ref-984)
984. 984 16 U.S.C. § 1802(37) (2000). [↑](#footnote-ref-985)
985. 985 Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs, 384 F.3d 1163, 1174 (9th Cir. 2004). [↑](#footnote-ref-986)
986. 986 16 U.S.C. § 1851(a)(3) (2000). [↑](#footnote-ref-987)
987. 987 Id. § 1851(a)(8). [↑](#footnote-ref-988)
988. 988 Id. § 1851(a)(10). [↑](#footnote-ref-989)
989. 989 Administrative Procedure Act, 5 U.S.C. § 553(b)(3)(B) (2000). [↑](#footnote-ref-990)
990. 990 The court assumed that the national standards apply to action taken under regulations implementing FMPs, although § 1851(a) explicitly requires only that FMPs and their implementing regulations be consistent with the national standards. Or. Trollers Ass'n v. Gutierrez, 452 F.3d 1104, 1121-22 (9th Cir. 2006). [↑](#footnote-ref-991)
991. 991 Id. at 1122. [↑](#footnote-ref-992)
992. 992 See Natural Res. Def. Council v. Evans, 316 F.3d 904, 910 (9th Cir. 2003) (noting parties' agreement that independent of the Magnuson Act, the notice and comment requirements of the APA applied to management measures); see also 50 C.F.R. § 660.411(b) (2005) (providing good cause exception to public comment requirement of the Magnuson Act). [↑](#footnote-ref-993)
993. 993 5 U.S.C. § 553(b)(3)(B) (2000). [↑](#footnote-ref-994)
994. 994 316 F.3d 904 (9th Cir. 2003). [↑](#footnote-ref-995)
995. 995 Id. at 912. [↑](#footnote-ref-996)
996. 996 Id. [↑](#footnote-ref-997)
997. 997 Or. Trollers Ass'n v. Gutierrez, 452 F.3d 1104, 1125 (9th Cir. 2006). [↑](#footnote-ref-998)
998. 998 Quiet Title Act, 28 U.S.C. § 2409a (2000). [↑](#footnote-ref-999)
999. 999 Administrative Procedure Act, 5 U.S.C.§§551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5362, 7521 (2000). [↑](#footnote-ref-1000)
1000. 1000 Federal Land Policy and Management Act of 1976, 43 U.S.C. §§1701-1785 (2000). [↑](#footnote-ref-1001)
1001. 1001 Act of May 20, 1862, ch. 75, 12 Stat. 392-93 (1862) (codified at 43 U.S.C. §§161-284) (repealed 1976). [↑](#footnote-ref-1002)
1002. 1002 Fitzgerald Living Trust v. United States, 460 F.3d 1259, 1261 (9th Cir. 2006). [↑](#footnote-ref-1003)
1003. 1003 Fitzgerald v. United States, 932 F. Supp. 1195 (D. Ariz. 1996), vacated, No. CIV-94-0518-PCT-PRG (D. Ariz. July 19, 1999). [↑](#footnote-ref-1004)
1004. 1004 Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3210(a) (2000). [↑](#footnote-ref-1005)
1005. 1005 National Forest Roads and Trails Act, 16 U.S.C.§§532-538 (2000). [↑](#footnote-ref-1006)
1006. 1006 Buono v. Norton, 371 F.3d 543, 545 (9th Cir. 2004). [↑](#footnote-ref-1007)
1007. 1007 Olsen v. Idaho State Bd. of Med., 363 F.3d 916, 922 (9th Cir. 2004). [↑](#footnote-ref-1008)
1008. 1008 Adams v. United States (Adams II), 255 F.3d 787, 794 (9th Cir. 2001). [↑](#footnote-ref-1009)
1009. 1009 See 36 C.F.R § 251.114(f) (2006) (directing the authorizing officer to ensure the landowner has "demonstrated a lack of any existing rights or routes of access available by deed or under State or common law"). [↑](#footnote-ref-1010)
1010. 1010 Skranak, 425 F.3d at 1221. To avoid conflict with the holding in Adams v. United States (Adams I), 3 F.3d 1254 (9th Cir. 1993) that access under ANILCA is determined regardless of preexisting easements, the court in Skranak held that deference to the USFS regulation was appropriate because Adams I did not go so far as to declare ANILCA unambiguous. Skranak, 425 F.3d at 1220. [↑](#footnote-ref-1011)
1011. 1011 Fitzgerald, 460 F.3d at 1264. [↑](#footnote-ref-1012)
1012. 1012 Act of May 20, 1862, 43 U.S.C. § 161 (repealed 1976). [↑](#footnote-ref-1013)
1013. 1013 The Ninth Circuit found persuasive the Tenth Circuit's holding in United States v. Jenks that settlers' implied license to access their property via public lands was not an implied easement. 129 F.3d 1348, 1354 (10th Cir. 1997). [↑](#footnote-ref-1014)
1014. 1014 See Burford v. Houtz, 133 U.S. 320, 326 (1890) (describing customary access to public lands in the nineteenth century). See also Light v. United States, 220 U.S. 523, 535 (1911) (clarifying that use of public lands does not confer to the public any vested rights). [↑](#footnote-ref-1015)
1015. 1015 Organic Administration Act of 1897, ch. 2, 30 Stat. 11, 34-36 (codified as amended at 16 U.S.C.§§473-482 (2000). [↑](#footnote-ref-1016)
1016. 1016 See United States v. Dunn, 478 F.2d 443 (9th Cir. 1973) (stating that the Government did not claim that an easement by necessity could not be had); United States v. Jenks, 129 F.3d 1348, 1353 (10th Cir. 1997) (showing that the court did not reach the question of an easement by necessity under the Homestead Act). [↑](#footnote-ref-1017)
1017. 1017 An easement by necessity arises where (1) the title to two parcels was held by a single owner, (2) the unity of title was severed by a conveyance of one of the parcels, and (3) at the time of severance, the easement was necessary for the owner of the severed parcel to use his property. Mont. Wilderness Ass'n v. U.S. Forest Serv., 496 F. Supp. 880, 885 (D. Mont. 1980). [↑](#footnote-ref-1018)
1018. 1018 129 F.3d at 1355. [↑](#footnote-ref-1019)
1019. 1019 Humphreys v. McKissock, 140 U.S. 304, 314 (1891). [↑](#footnote-ref-1020)
1020. 1020 Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(c) (2000). [↑](#footnote-ref-1021)
1021. 1021 H.R. Rep. No. 88-1920 (1964). [↑](#footnote-ref-1022)
1022. 1022 Forest Service Decisionmaking and Appeals Reform Act, Pub. L. No. 102-381, § 322, 106 Stat. 1374, 1419 (codified at 16 U.S.C. § 1612 note (2000)). [↑](#footnote-ref-1023)
1023. 1023 Earth Island Inst. v. Ruthenbeck, 459 F.3d 954, 958 (9th Cir. 2006). [↑](#footnote-ref-1024)
1024. 1024 National Environmental Policy Act of 1969, 42 U.S.C.§§4321-4370e (2000). [↑](#footnote-ref-1025)
1025. 1025 Forest Service Decisionmaking and Appeals Reform Act, Pub. L. No. 102-381 § 322(a) (codified as amended at 16 U.S.C. § 1612 (2000)). [↑](#footnote-ref-1026)
1026. 1026 Earth Island Inst., 459 F.3d at 959. [↑](#footnote-ref-1027)
1027. 1027 Notice, Comment, and Appeal Procedures for National Forest System Projects and Activities, 68 Fed. Reg. 33,582 (June 4, 2003). [↑](#footnote-ref-1028)
1028. 1028 Parks, Forests, and Public Property, 36 C.F.R. § 215.12(f) (2006). [↑](#footnote-ref-1029)
1029. 1029 USFS published the new category of projects in the final implementing procedures for NEPA Documentation Needed for Fire Management Activities, 68 Fed. Reg. 33,814, 33,814-24 (June 4, 2003). [↑](#footnote-ref-1030)
1030. 1030 National Environmental Policy Act Documentation Needed for Limited Timber Harvest, 68 Fed. Reg. 44,598, 44,598-608 (July 29, 2003). [↑](#footnote-ref-1031)
1031. 1031 Earth Island Inst., 459 F.3d at 958. [↑](#footnote-ref-1032)
1032. 1032 The parties did not dispute that an organization has standing to sue on behalf of its members "when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 181 (2000). [↑](#footnote-ref-1033)
1033. 1033 Earth Island Inst., 459 F.3d at 960. [↑](#footnote-ref-1034)
1034. 1034 To establish standing, a plaintiff must show that "(1) plaintiff has suffered an "injury in fact' that is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) … the injury will be redressed by a favorable decision." Friends of the Earth, Inc., 528 U.S. at 180-81. [↑](#footnote-ref-1035)
1035. 1035 Sierra Club v. Morton, 405 U.S. 727, 735-36 (1972). [↑](#footnote-ref-1036)
1036. 1036 Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992). [↑](#footnote-ref-1037)
1037. 1037 City of Davis v. Coleman, 521 F.2d 661, 671 (9th Cir. 1975). [↑](#footnote-ref-1038)
1038. 1038 Earth Island Inst., 459 F.3d at 961. [↑](#footnote-ref-1039)
1039. 1039 Id. at 960. [↑](#footnote-ref-1040)
1040. 1040 387 U.S. 136, 140 (1967). [↑](#footnote-ref-1041)
1041. 1041 Id. at 149. [↑](#footnote-ref-1042)
1042. 1042 Id. at 140. [↑](#footnote-ref-1043)
1043. 1043 387 U.S. 158 (1967). [↑](#footnote-ref-1044)
1044. 1044 Id. at 164. [↑](#footnote-ref-1045)
1045. 1045 538 U.S. 803 (2003). [↑](#footnote-ref-1046)
1046. 1046 Earth Island Inst., 459 F.3d 954, 962-63 (9th Cir. 2006) (citing Nat'l Park Hospitality Ass'n, 538 U.S. at 812 (2003)). [↑](#footnote-ref-1047)
1047. 1047 467 U.S. 837 (1984). [↑](#footnote-ref-1048)
1048. 1048 For an agency's interpretation of a statute to be entitled to deference, Chevron also requires that Congress have given the agency the authority to interpret the statute in question, but that point was not at issue here. Id. [↑](#footnote-ref-1049)
1049. 1049 Administrative Procedures Act, 5 U.S.C.§§551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5362, 7521 (2000). [↑](#footnote-ref-1050)
1050. 1050 Id. § 706(2)(A). [↑](#footnote-ref-1051)
1051. 1051 Central Valley Project Improvement Act § 3406(b), Title XXXIV of the Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575, 106 Stat. 4600, 4714 (1992). [↑](#footnote-ref-1052)
1052. 1052 Cent. Delta Water Agency v. United States (Central Delta I), 306 F.3d 938, 945 (9th Cir. 2002) (summarizing the CVPIA); Central Valley Project Improvement Act§§3402, 3406(b) (1992). [↑](#footnote-ref-1053)
1053. 1053 Central Valley Project Improvement Act § 3406(b)(2) (1992). [↑](#footnote-ref-1054)
1054. 1054 Id. § 3406(b)(3). [↑](#footnote-ref-1055)
1055. 1055 Central Delta I, 306 F.3d at 950. [↑](#footnote-ref-1056)
1056. 1056 Cent. Valley Water Agency v. United States, 327 F. Supp. 2d 1180, 1218 (E.D. Cal. 2004). [↑](#footnote-ref-1057)
1057. 1057 Magana v. N. Mariana Islands, 107 F.3d 1436, 1438 (9th Cir. 1997). [↑](#footnote-ref-1058)
1058. 1058 Cent. Delta Water Agency v. Bureau of Reclamation (Central Delta II), 452 F.3d 1021, 1025 (9th Cir. 2006) (quoting Olsen v. Idaho State Bd. of Med., 363 F.3d 916, 922 (9th Cir. 2004)). [↑](#footnote-ref-1059)
1059. 1059 Id. [↑](#footnote-ref-1060)
1060. 1060 Id. at 1026. [↑](#footnote-ref-1061)
1061. 1061 Central Valley Project Improvement Act § 3406(b)(2). [↑](#footnote-ref-1062)
1062. 1062 Id. (emphasis added). [↑](#footnote-ref-1063)
1063. 1063 Central Delta II, 452 F.3d at 1026. [↑](#footnote-ref-1064)
1064. 1064 Id. [↑](#footnote-ref-1065)
1065. 1065 Id. [↑](#footnote-ref-1066)
1066. 1066 Id. [↑](#footnote-ref-1067)
1067. 1067 Id. [↑](#footnote-ref-1068)
1068. 1068 Central Delta II, 452 F.3d at 1026. [↑](#footnote-ref-1069)
1069. 1069 Id. at 1027. [↑](#footnote-ref-1070)
1070. 1070 Alien Tort Claims Act, 28 U.S.C. § 1350 (2000). [↑](#footnote-ref-1071)
1071. 1071 United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 (1982). [↑](#footnote-ref-1072)
1072. 1072 Sarei v. Rio Tinto (Sarei I), PLC, 221 F. Supp. 2d 1116, 1161-62 (C.D. Cal. 2002). [↑](#footnote-ref-1073)
1073. 1073 Fed. R. Civ. P. 12(b)(6). [↑](#footnote-ref-1074)
1074. 1074 Sarei I, 221 F. Supp. 2d at 1121. [↑](#footnote-ref-1075)
1075. 1075 Sarei v. Rio Tinto (Sarei II), PLC, 456 F.3d 1069, 1075-76 (9th Cir. 2006). [↑](#footnote-ref-1076)
1076. 1076 Sarei I, 221 F. Supp. 2d at 1139-63. [↑](#footnote-ref-1077)
1077. 1077 Id. at 1148-49. [↑](#footnote-ref-1078)
1078. 1078 Id. at 1193-99. [↑](#footnote-ref-1079)
1079. 1079 Id. at 1199-1209. [↑](#footnote-ref-1080)
1080. 1080 Id. at 1183-93. [↑](#footnote-ref-1081)
1081. 1081 Transmission Agency v. Sierra Pac. Power Co., 295 F.3d 918, 923 (9th Cir. 2002). [↑](#footnote-ref-1082)
1082. 1082 Sosa v. Alvarez-Machain, 542 U.S. 692 (2004). [↑](#footnote-ref-1083)
1083. 1083 Sarei II, 456 F.3d at 1077 (quoting Sosa, 542 U.S. at 725, 720 (internal citations omitted)). [↑](#footnote-ref-1084)
1084. 1084 Sarei I, 221 F. Supp. 2d at 1132. [↑](#footnote-ref-1085)
1085. 1085 See United States v. Alaska, 503 U.S. 569, 588 n.10 (1992) (providing "the United States … has recognized that [the UNCLOS's] baseline provisions reflect customary international law"). [↑](#footnote-ref-1086)
1086. 1086 See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964); Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 605-07 (9th Cir. 1977) (describing the history of the act of state doctrine). [↑](#footnote-ref-1087)
1087. 1087 W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., 493 U.S. 400, 404 (1990). [↑](#footnote-ref-1088)
1088. 1088 Id. at 405; see also Credit Suisse v. U. S. Dist. Court for Cent. Dist. of Cal., 130 F.3d 1342, 1346 (9th Cir. 1997). [↑](#footnote-ref-1089)
1089. 1089 Sabbatino, 376 U.S. at 428. [↑](#footnote-ref-1090)
1090. 1090 Liu v. Republic of China, 892 F.2d 1419, 1432 (9th Cir. 1989) (citing Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 694-95 (1976)); Republic of Philippines v. Marcos, 862 F.2d 1355, 1361 (9th Cir. 1988) (en banc). [↑](#footnote-ref-1091)
1091. 1091 See, e.g., Nat'l Coal. Gov't of Burma v. Unocal, Inc., 176 F.R.D. 329, 352 (C.D. Cal. 1997). [↑](#footnote-ref-1092)
1092. 1092 See In re Estate of Marcos Human Rights Litig., 978 F.2d 493, 498 n.10 (9th Cir. 1992). [↑](#footnote-ref-1093)
1093. 1093 Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 715 (9th Cir. 1992). [↑](#footnote-ref-1094)
1094. 1094 See id. at 714 ("[A] jus cogens norm … "is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'" (quoting Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332)). [↑](#footnote-ref-1095)
1095. 1095 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964). [↑](#footnote-ref-1096)
1096. 1096 See Societe Nationale Industrielle Aerospatielle v. U.S. Dist. Court for the S. Dist. of Iowa, 482 U.S. 522, 544 n.27 (1987) ("Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states."); In re Simon (Hong Kong & Simon Banking Corp. v. Simon), 153 F.3d 991, 998 (9th Cir. 1998) (citing Hilton v. Guyot, 159 U.S. 113, 163-64 (1895)); see also Sosa v. Alvarez-Machain, 542 U.S. 692 761 (2004) (Breyer, J., concurring) (emphasizing the importance of courts determining "whether the exercise of jurisdiction under the ATCA is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement."). [↑](#footnote-ref-1097)
1097. 1097 See JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V., 412 F.3d 418, 422 (2d Cir. 2005) ("Declining to decide a question of law on the basis of international comity is a form of abstention, and we review a district court's decision to abstain on international comity grounds for abuse of discretion."); see also Remington Rand Corp.-Del. v. Bus. Sys. Inc., 830 F.2d 1260, 1266 (3d Cir. 1987) ("Because the extension or denial of comity is discretionary, we review this issue by the abuse of discretion standard."). [↑](#footnote-ref-1098)
1098. 1098 Sarei I, 221 F. Supp. 2d at 1201. [↑](#footnote-ref-1099)
1099. 1099 49 C.F.R. §§171-80 (2006). [↑](#footnote-ref-1100)
1100. 1100 National Environmental Policy Act of 1969, 42 U.S.C.§§4321-4370e (2000). [↑](#footnote-ref-1101)
1101. 1101 Hazardous Material Transportation Act of 1970, 49 U.S.C. §§5101-5128 (2000). [↑](#footnote-ref-1102)
1102. 1102 Id. § 5103(a), (b)(1). [↑](#footnote-ref-1103)
1103. 1103 49 C.F.R. § 171.1(c)(1) (2006). [↑](#footnote-ref-1104)
1104. 1104 Nuclear Info. & Res. Serv. v. DOT Research (Nuclear Info), 457 F.3d 956, 958 (9th Cir. 2006). [↑](#footnote-ref-1105)
1105. 1105 Under the new rule, the definition of "radioactive material" is ""any material containing radionuclides where both the activity concentration and the total activity in the consignment exceed the values specified' in the new dose-based tables." Id. (quoting 49 C.F.R. § 173.403 (2006)). [↑](#footnote-ref-1106)
1106. 1106 Id. (citing Luong v. Circuit City Stores, Inc., 368 F.3d 1109, 1111 n.2 (9th Cir. 2004)). [↑](#footnote-ref-1107)
1107. 1107 Administrative Procedure Act, 5 U.S.C.§§551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2000). [↑](#footnote-ref-1108)
1108. 1108 Cetacean Cmty. v. Bush, 386 F.3d 1169, 1179 (9th Cir. 2004). [↑](#footnote-ref-1109)
1109. 1109 Carpenter v. Dept. of Transp., 13 F.3d 313, 316 (9th Cir. 1994). [↑](#footnote-ref-1110)
1110. 1110 Federal Railroad Safety Act of 1970 (FRSA), 49 U.S.C.§§20101-20117 (2000). [↑](#footnote-ref-1111)
1111. 1111 Id. § 20114(c) (2000) (emphasis added). [↑](#footnote-ref-1112)
1112. 1112 The Hobbs Act, 28 U.S.C. §§2341-51 (2000). [↑](#footnote-ref-1113)
1113. 1113 Id. § 2342(7). [↑](#footnote-ref-1114)
1114. 1114 49 C.F.R. § 171.1(c)(1) (2006). [↑](#footnote-ref-1115)
1115. 1115 Nuclear Info, 457 F.3d 956, 959-60 (9th Cir. 2006). [↑](#footnote-ref-1116)
1116. 1116 Id. at 960. [↑](#footnote-ref-1117)
1117. 1117 Id. (quoting United States v. Daas, 198 F.3d 1167, 1174 (9th Cir. 1999)). [↑](#footnote-ref-1118)
1118. 1118 Suburban O'Hare Comm'n v. Dole, 787 F.2d 186, 192 (7th Cir. 1986). [↑](#footnote-ref-1119)
1119. 1119 Nuclear Info, 457 F.3d at 961. [↑](#footnote-ref-1120)
1120. 1120 Id. at 962 (quoting 28 U.S.C. § 1631 (2000)). [↑](#footnote-ref-1121)
1121. 1121 28 U.S.C. § 1631 (2000). [↑](#footnote-ref-1122)
1122. 1122 Id. § 2344. [↑](#footnote-ref-1123)
1123. 1123 Bonneville Project Act of 1937, 16 U.S.C.§§832-832m (2000). [↑](#footnote-ref-1124)
1124. 1124 Id. § 838i(a), (b). [↑](#footnote-ref-1125)
1125. 1125 Ass'n of Pub. Agency Customers, Inc. v. BPA, 126 F.3d 1158, 1164 (9th Cir. 1997). [↑](#footnote-ref-1126)
1126. 1126 Pacific Northwest Power Planning and Conservation Act, Pub L. No. 96-501, 94 Stat. 2697 (1980) (codified at 16 U.S.C. §§839-839h). [↑](#footnote-ref-1127)
1127. 1127 Nw. Envtl. Def. Ctr. v. Bonneville Power Admin. (NEDC v. BPA), No. 06-70430, 939, 947 (9th Cir. 2007); 16 U.S.C. § 839(b)(a)(1). [↑](#footnote-ref-1128)
1128. 1128 16 U.S.C. § 839(b)(h)(10)(A). [↑](#footnote-ref-1129)
1129. 1129 NEDC v. BPA, No. 06-70430 at 949 (citing Nw. Power and Conservation Council, Columbia River Basin Fish and Wildlife Program 16 (2000), available at http://www.nwcouncil.org/library/2000/2000-19/FullReport.pdf.). [↑](#footnote-ref-1130)
1130. 1130 Id. at 949 (citing Nw. Power and Conservation Council, Columbia River Basin Fish and Wildlife Program 7, 17 (2000), available at http://www.nwcouncil.org/library/2000/2000-19/FullReport.pdf.). [↑](#footnote-ref-1131)
1131. 1131 The 2003 Amendments stated specifically that the FPC was to "(1) plan and implement a smolt monitoring program; (2) gather, organize, analyze, store, and make widely-available monitoring and research information about fish passage and the implementation of water management and fish passage and measures contained in the Council's Program; (3) provide technical information to assist fish and wildlife agencies and Indian tribes requesting the federal dams to spill water; and (4) provide technical assistance to ensure the recommendations for river operations avoid conflicts between anadromous and resident fish." NEDC v. BPA, No. 06-70430 at 951. [↑](#footnote-ref-1132)
1132. 1132 Id. at 952 (quoting S. Rep. No. 109-84, at 179 (2005) (internal quotations omitted)). [↑](#footnote-ref-1133)
1133. 1133 NEDC v. BPA, No. 06-70430 at 953 (quoting H.R. Rep. No. 109-275, at 174 (2005) (Conf. Rep.)). [↑](#footnote-ref-1134)
1134. 1134 Northwest Environmental Defense Center, Public Employees for Environmental Responsibility, and Northwest Sportfishing Industry Association filed their petition on January 23, 2006, and the Confederated Tribes and Bands of the Yakama Nation filed on March 3, 2006. The petitions were consolidated on April 7, 2006. [↑](#footnote-ref-1135)
1135. 1135 NEDC v. BPA, No. 06-70430 at 955 (alterations original) citing Pacific Northwest Power Planning and Conservation Act, Pub L. No. 96-501, 94 Stat. 2697 (1980) (codified at 16 U.S.C.§§839-839h), 16 U.S.C. § 839f(e)(5). [↑](#footnote-ref-1136)
1136. 1136 Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). [↑](#footnote-ref-1137)
1137. 1137 Administrative Procedure Act, 5 U.S.C.§§551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5362, 7521 (2000). [↑](#footnote-ref-1138)
1138. 1138 See id. § 706(2)(A). [↑](#footnote-ref-1139)
1139. 1139 431 F.3d 643, 654 (9th Cir. 2005). [↑](#footnote-ref-1140)
1140. 1140 668 F.2d 1107, 1109 (9th Cir. 1982). [↑](#footnote-ref-1141)
1141. 1141 NEDC v. BPA, No 06-70430 at 960 (9th Cir. Jan 24, 2007). [↑](#footnote-ref-1142)
1142. 1142 Under the APA, the court has to set aside BPA's actions if they were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). [↑](#footnote-ref-1143)
1143. 1143 See H.R. Rep. No. 109-275, at 174 (2005) (Conf. Rep), S. Rep. No. 109-84, at 179 (2005). [↑](#footnote-ref-1144)
1144. 1144 NEDC v. BPA, No 06-70430 at 961. [↑](#footnote-ref-1145)
1145. 1145 Id. at 962. [↑](#footnote-ref-1146)
1146. 1146 Shannon v. United States, 512 U.S. 573 (1994). [↑](#footnote-ref-1147)
1147. 1147 NEDC v. BPA, No 06-70430 at 963 (quoting Shannon, 512 U.S. at 579 (internal quotation marks omitted, citation omitted, alterations original)); see also Cherokee Nation of Okla. v. Leavitt, 543 U.S. 631, 646 (2005) (stating that "the relevant case law makes clear that restrictive language contained in Committee Reports is not legally binding"). [↑](#footnote-ref-1148)
1148. 1148 U.S. Const. art. I, § 7, cl. 2; see also Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 952 (1983). [↑](#footnote-ref-1149)
1149. 1149 NEDC v. BPA, No. 06-70430 at 967. [↑](#footnote-ref-1150)
1150. 1150 318 U.S. 80 (1943) [↑](#footnote-ref-1151)
1151. 1151 Id. at 95. [↑](#footnote-ref-1152)
1152. 1152 NEDC v. BPA, No. 06-70430, at 970, quoting Motor Vehicles Mfg. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 48 (1983) (citation omitted) [hereinafter State Farm]. [↑](#footnote-ref-1153)
1153. 1153 See State Farm, 463 U.S. at 43. [↑](#footnote-ref-1154)
1154. 1154 444 F.2d 841 (D.C. Cir. 1970). [↑](#footnote-ref-1155)
1155. 1155 Id. [↑](#footnote-ref-1156)
1156. 1156 See Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962). [↑](#footnote-ref-1157)
1157. 1157 342 F.3d 924 (9th Cir. 2003). [↑](#footnote-ref-1158)
1158. 1158 463 U.S. 29 (1983). [↑](#footnote-ref-1159)
1159. 1159 State Farm, 463 U.S. at 48. [↑](#footnote-ref-1160)
1160. 1160 Administrative Procedure Act, 5 U.S.C.§§551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5362, 7521 (2000). [↑](#footnote-ref-1161)
1161. 1161 Federal Land Policy and Management Act of 1976, 43 U.S.C. §§1701-1785 (2000). [↑](#footnote-ref-1162)
1162. 1162 43 U.S.C. § 1752(a) (2000); 36 C.F.R. § 222 (2006). [↑](#footnote-ref-1163)
1163. 1163 36 C.F.R. § 222.3(c)(1) (2006). [↑](#footnote-ref-1164)
1164. 1164 43 U.S.C. § 1752(d) (2000); 36 C.F.R. § 222.1(b) (2006). [↑](#footnote-ref-1165)
1165. 1165 36 C.F.R. § 222.1(b)(5) (2006); 43 U.S.C. § 1702(p) (2000). [↑](#footnote-ref-1166)
1166. 1166 Or. Natural Desert Ass'n v. USFS (ONDA), 465 F.3d 977, 980 (9th Cir. 2006); see also 36 C.F.R. §§222.1- 222.4 (2006), 43 U.S.C. § 1752 (2000). [↑](#footnote-ref-1167)
1167. 1167 36 C.F.R. § 222.3(c)(1) (2006); Forest Service Handbook 2209.12, § 94.2. [↑](#footnote-ref-1168)
1168. 1168 43 U.S.C. § 1702(k)(1) (2000). [↑](#footnote-ref-1169)
1169. 1169 36 C.F.R. § 222.1(b) (2006); 43 U.S.C. §§1702(k)(1), 1752(d) (2000). [↑](#footnote-ref-1170)
1170. 1170 16 U.S.C. § 1604(i) (2000); see also Neighbors of Cuddy Mountain v. Alexander, 303 F.3d 1059, 1062 (9th Cir. 2002) (noting that specific Forest Service projects must be in accord with the relevant Forest Plan). [↑](#footnote-ref-1171)
1171. 1171 See Forest Service Manual § 2212.3. [↑](#footnote-ref-1172)
1172. 1172 See Anchustegui v. Dep't of Agric., 257 F.3d 1124, 1126 (9th Cir. 2001) (describing an AOI drafted in light of over-grazing in riparian and upland areas the previous year). [↑](#footnote-ref-1173)
1173. 1173 Wild and Scenic Rivers Act of 1968, 16 U.S.C.§§1271-1287 (2000). [↑](#footnote-ref-1174)
1174. 1174 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-1175)
1175. 1175 National Environmental Policy Act of 1969, 42 U.S.C.§§4321-4370e (2000). [↑](#footnote-ref-1176)
1176. 1176 Or. Natural Desert Ass'n v. USFS, 312 F. Supp. 2d 1337, 1341-43 (D. Or. 2004). [↑](#footnote-ref-1177)
1177. 1177 See Administrative Procedure Act, 5 U.S.C. §§702-706 (2000) (establishing that "any person suffering legal wrong because of an agency action" is entitled to judicial review, and setting out the form and scope of judicial review generally); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 882 (1990). [↑](#footnote-ref-1178)
1178. 1178 5 U.S.C. §§702-706 (2000). [↑](#footnote-ref-1179)
1179. 1179 ONDA, 465 F.3d 977, 982 (9th Cir. 2006) (quoting Bennett v. Spear, 520 U.S. 154, 177-78 (1997)). [↑](#footnote-ref-1180)
1180. 1180 Id. (quoting Indus. Consumers of Nw. Utils. v. Bonneville Power Admin., 408 F.3d 638, 646 (9th Cir. 2005). [↑](#footnote-ref-1181)
1181. 1181 Id. [↑](#footnote-ref-1182)
1182. 1182 Id. [↑](#footnote-ref-1183)
1183. 1183 Id. (quoting Or. Natural Res. Council v. Harrell, 52 F.3d 1499, 1504 (9th Cir. 1995). [↑](#footnote-ref-1184)
1184. 1184 Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 64 (2004). [↑](#footnote-ref-1185)
1185. 1185 ONDA, 465 F.3d at 983 (quoting S. Utah Wilderness Alliance, 542 U.S at 62). [↑](#footnote-ref-1186)
1186. 1186 Id. [↑](#footnote-ref-1187)
1187. 1187 5. U.S.C. § 551(8) (2000). [↑](#footnote-ref-1188)
1188. 1188 Bennett v. Spear, 520 U.S. 154 (1997). [↑](#footnote-ref-1189)
1189. 1189 Id. at 178. [↑](#footnote-ref-1190)
1190. 1190 Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 478 (2001). [↑](#footnote-ref-1191)
1191. 1191 ONDA, 465 F.3d at 984. [↑](#footnote-ref-1192)
1192. 1192 Idaho Watersheds Project, 307 F.3d at 828. [↑](#footnote-ref-1193)
1193. 1193 Whitman, 531 U.S. at 478. [↑](#footnote-ref-1194)
1194. 1194 832 F.2d 1071 (9th Cir. 1987). [↑](#footnote-ref-1195)
1195. 1195 Id. at 1075. [↑](#footnote-ref-1196)
1196. 1196 368 F.3d 1118 (9th Cir. 2004). [↑](#footnote-ref-1197)
1197. 1197 Id. at 1147 (internal quotations and citation omitted). [↑](#footnote-ref-1198)
1198. 1198 ONDA, 465 F.3d 977, 986 (quoting Bennett v. Spear, 520 U.S. 154, 178 (1997) (internal quotations and emphasis omitted). [↑](#footnote-ref-1199)
1199. 1199 Bennett, 520 U.S. at 178. [↑](#footnote-ref-1200)
1200. 1200 911 F.2d 261 (9th Cir. 1990). [↑](#footnote-ref-1201)
1201. 1201 Id. at 264 (internal quotations omitted). [↑](#footnote-ref-1202)
1202. 1202 257 F.3d 1124 (9th Cir. 2001). [↑](#footnote-ref-1203)
1203. 1203 Id. at 1128. [↑](#footnote-ref-1204)
1204. 1204 5 U.S.C. § 558(b)-(c) (2000). [↑](#footnote-ref-1205)
1205. 1205 ONDA, 465 F.3d at 987 (quoting Or. Natural Desert Ass'n v. USFS, 312 F. Supp. 2d 1337, 1343 (D. Or. 2004)). [↑](#footnote-ref-1206)
1206. 1206 ONDA, 465 F.3d at 987 (quoting Ukiah Valley Med. Ctr., 911 F.2d at 264). [↑](#footnote-ref-1207)
1207. 1207 Endangered Species Act of 1973, 16 U.S.C.§§1531-1544 (2000). [↑](#footnote-ref-1208)
1208. 1208 ONDA, 465 F.3d at 989. [↑](#footnote-ref-1209)
1209. 1209 242 F.3d 1097 (9th Cir. 2001). [↑](#footnote-ref-1210)
1210. 1210 Id. at 1101 n.6. [↑](#footnote-ref-1211)
1211. 1211 ONDA, 465 F.3d at 991. [↑](#footnote-ref-1212)
1212. 1212 542 U.S. 55 (2004). [↑](#footnote-ref-1213)
1213. 1213 Id. at 66-67. [↑](#footnote-ref-1214)