

# ENVIRONMENTAL LAW

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**LENGTH:** 37975 words

**CASE SUMMARIES:**

**SUMMARY:**

... In this case of first impression, the Ninth Circuit held that an inmate was not an employee within the meaning of the Acts. ... In Louisiana-Pacific, the Ninth Circuit had stressed the need for uniform federal rules for successor liability. ... In order to successfully advance a discrimination claim under the Federal Power Act, the Ninth Circuit held that APAC had to show that its members were similarly situated to the DSIs and that there was disparate treatment for the same service. ... The court also found no regulation declaring that commercial fishing derogates park values and purposes. ... The litigation began with four Tribal-State compacts between the State and each band of Indians pursuant to IGRA. ... The State's final argument was that the bands were conducting illegal gambling not authorized by a Tribal-State compact. ... The Ninth Circuit found that the challenges to the district court's calculations lacked merit, except for the Hopi argument that the district court wrongly denied damages for lost grazing opportunity on lands that the Hopi had set aside for wildlife. ... On appeal, the Ninth Circuit held that principles of comity, not full faith and credit, were determinative of whether the district court should recognize and enforce the tribal judgment. ... According to the Ninth Circuit, federal courts should recognize and enforce tribal judgments. ...

**TEXT:**

[\*577]

I. Environmental Quality

A. Clean Air Act

1. Coupar v. United States Department of Labor, 105 F.3d 1263 (9th Cir. 1997).

Coupar, a federal inmate who had previously worked for Federal Prison Industries, Inc. (FPI), filed whistleblowing complaints against FPI under the Clean Air Act of 1970 (CAA) <sup>n1</sup> and Toxic Substances Control Act (TSCA). <sup>n2</sup> He claimed that he was transferred to another facility in retaliation for his environmental complaints about FPI operations, and that FPI also retaliated by refusing to place him on a waiting list for a job at the new facility. The United States Department of Labor denied Coupar's retaliation complaint, and Coupar subsequently requested a hearing before a Department of Labor Administrative Law Judge (ALJ). The ALJ scheduled the hearing, but the Bureau of Prisons (Bureau), representing FPI, refused to acknowledge jurisdiction of the ALJ over Coupar's claim and did not participate in the proceeding. The ALJ concluded that he did have jurisdiction over the claim because Coupar was an employee within the meaning of the CAA and TSCA (Acts) and recommended a default judgment because of the Bureau's failure to appear at the proceeding. However, the Secretary of Labor rejected the ALJ's recommended decision and order because he disagreed with the conclusion that Coupar qualified as an employee under the whistleblowing provisions at issue. In this case of first impression, the Ninth Circuit held that an inmate was not an employee within the meaning of the Acts.

The Secretary is charged with administration of the whistleblower protection provisions of the Acts, which stipulate that "no employer may discharge any employee or otherwise discriminate against [him] with respect to...compensation, terms, conditions, or privileges of employment" <sup>n3</sup> because the employee engaged in protected activities - i.e., whistleblowing - related to enforcement of the Acts. However, Congress did not define "employee" in either statute.

[\*578] The Ninth Circuit held that the Secretary was entitled to Chevron <sup>n4</sup> deference in interpreting the term "employee" not to encompass Coupar and that his interpretation was reasonable. The court found an analogy between Coupar's case and *Hale v. Arizona*. <sup>n5</sup> In *Hale*, the court held that inmates were not "employees" for purposes of the minimum wage provision of the Fair Labor Standards Act (FLSA). <sup>n6</sup> In reaching that conclusion, the court employed the "economic reality" test. The economic reality test focuses on the relationship between prison and prisoner, which the court found to be penological rather than pecuniary. In the present case, the Ninth Circuit also found the relationship between Coupar and FPI to be penological, as he was obligated to work pursuant to a prison work program.

Coupar argued that the economic reality test was not appropriate based on differences between the purpose of the FLSA, which is to regulate the economic relationship between employer and employee, and the purposes of the CAA and TSCA, which are to protect the environment. The court rejected this argument, stating that the goal of the whistleblowing provisions is "most certainly aimed at regulating and restricting the relationship between employer and employee." <sup>n7</sup> Congress could have extended the protection to prevent retaliation by any violator against any whistleblower, but chose to draw the line at protecting employees from retaliation by their employer. The court reasoned that Congress intended to protect and regulate the usual employer-employee relationship, not relationships based on forced labor. One policy concern the court expressed was the potential for excessive interference with the penological system if the term "employee" was defined to include prison inmates.

The ALJ had applied the "Reid-Darden" test, which focuses on the hiring party's right to control the manner and means by which the product is accomplished. The Ninth Circuit felt that the more appropriate focus was whether Coupar and FPI could be said to be in a "conventional master-servant relationship," which would not be the case according to Hale. The court listed other factors to be considered in deciding if a hired party is an employee under the general common law of agency, including the degree of skill required to do the job, source of the tools, location of the work, and the hired party's discretion over when and how long to work.

Coupar also argued that he was entitled to prevail because FPI failed to appear in the administrative proceedings. However, the Ninth Circuit [\*579] held that a decision of the Secretary to grant a default judgment is discretionary, and that he did not abuse his discretion by rejecting the ALJ's recommended default judgment. Also, FPI was not without "good cause" to believe that it was not required to attend the ALJ proceedings, considering the court's agreement with their interpretation of who is an employee under the Acts.

Coupar also argued that because FPI did not raise in the administrative proceedings the issue of whether he was an employee under the Acts, FPI waived the issue for purposes of Ninth Circuit review. However, the court pointed out that the issue was considered by both the ALJ and Secretary; therefore, the issue was not presented for the first time at the appellate level, and it was appropriate for the court to have addressed it.

## 2. Disimone v. Browner, 121 F.3d 1262 (9th Cir. 1997).

For several years, Maricopa and Pima counties, which respectively include the cities of Phoenix and Tucson, Arizona, have had unacceptably high levels of carbon monoxide. The areas failed to attain air quality standards under the Clean Air Act <sup>n8</sup> (CAA) by the statutory deadline of December 31, 1995, and EPA has reclassified the areas as "serious" nonattainment areas. In a 1990 case, Delaney v. EPA, <sup>n9</sup> a citizen suit was brought against the Environmental Protection Agency (EPA) under the CAA, claiming that EPA failed to perform its duties in these two areas. The Ninth Circuit ordered EPA to promulgate a Federal Implementation Plan (FIP) and to disapprove the Arizona State Implementation Plan (SIP) with regard to the two counties. Later that year, Congress amended the CAA, leading EPA to request that the Ninth Circuit recall its earlier mandate set down in Delaney. The panel denied EPA's request. However, in 1996 EPA accepted a contingency provision in the revised Arizona SIP and rescinded the FIP completely. The FIP provision required that transportation projects be delayed and that certain measures be adopted if a nonattainment area experienced violations of carbon monoxide standards.

In this case, two individuals, Barry Disimone and Donald Steuter, sued EPA for approving the SIP and withdrawing the FIP. The Ninth Circuit held that EPA's actions were contrary to a direct court mandate and therefore were illegal. In addition, EPA was collaterally estopped from claiming that its action was required by the 1990 Amendments to the CAA. The Ninth Circuit based its decision on the "law of the case doctrine" <sup>n10</sup> because EPA's motion to recall mandate and amend judgment had already been denied by a panel of the court. Instead of following the mandate ordered, EPA proceeded to approve the SIP. The Ninth Circuit admitted that typically it confines the law of the case doctrine to decisions in the same case as the one in which it is applied, yet here the cases involved [\*580] different petitioners. However, the court applied the doctrine because both suits were brought against the same agency, concerned the same issue, and were on behalf of the same citizen population.

The Ninth Circuit also held that EPA was precluded from claiming that its action was required by the 1990 Amendments because the same issue was already litigated and decided. First, EPA's argument in both cases was that the pre-Amendment guidelines were inconsistent with the 1990 Amendments. Thus, the same issue was involved in both cases. Second, the court inferred that the panel must have decided against all of EPA's arguments because such a decision was necessary to deny the motion. Therefore, the court found that the panel had decided that the 1990 Amendments did not warrant recalling EPA's mandate. Furthermore, such a decision was critical and necessary to its order. Finally, there were no circumstances precluding application of the collateral estoppel doctrine. Therefore, the Ninth Circuit held that EPA was collaterally estopped from arguing that the 1990 Amendments permitted it to approve a SIP in place of an FIP.

## B. Hazardous Waste

### 1. Ashoff v. City of Ukiah, 130 F.3d 409 (9th Cir. 1997).

Ashoff and other citizens sued the City of Ukiah (city) for injunctive relief, alleging that its solid waste disposal site violated the

Resource Conservation and Recovery Act (RCRA),<sup>n11</sup> Clean Water Act (CWA),<sup>n12</sup> and state law. The district court granted the city's motion to dismiss the RCRA claim for lack of subject matter jurisdiction, concluding that RCRA did not authorize citizen suits "in federal court to enforce state regulations authorized under Subtitle D."<sup>n13</sup> Ashoff was therefore constricted to alleging violations of the federal minimum criteria in his complaint. Ashoff timely appealed the dismissal of the RCRA claims, and the Ninth Circuit held that RCRA authorized citizen suits for violations of federal minimum criteria for solid waste landfills, even after a state had adopted a permit program for landfills pursuant to federal criteria, but the statute did not authorize citizen suits based on state standards that were more stringent than federal minimum criteria.

Because lack of subject matter jurisdiction is a question of law, the court reviewed the claims de novo. The Ninth Circuit first affirmed that RCRA authorized citizen suits in authorized states based on the plain language of RCRA's citizen suit provision which states, "any person may commence a civil action on his behalf...against any person...who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter."<sup>n14</sup> Therefore, if state standards become effective pursuant to [\*581] RCRA, or, for example, are part of an authorized state program, a citizen can sue in federal court to enforce the standard. In this case, California had created such a program, which was approved by the Environmental Protection Agency (EPA) in 1993. In some cases federal regulations give states the option of establishing an alternative measure to meet the federal criteria,<sup>n15</sup> and EPA has endorsed citizen suits brought under RCRA for noncompliance with the state selected alternative.

The court then turned to the question of whether RCRA authorized citizen suits based on state standards that exceed the federal criteria, and the court concluded that it did not. First, based on statutory construction, to allow such suits would be inconsistent with the justification for RCRA citizen suits. By implementing the federal criteria, a state's standards become effective pursuant to RCRA and therefore are subject to citizens suing under RCRA. In contrast, RCRA does not authorize suits for violations of state standards that are more stringent than the federal criteria, because such standards do not become effective pursuant to RCRA. The legal effect of such standards flow from state law; therefore, federal court is not an appropriate forum to hear claims regarding their violation.

The court considered two arguments advanced by Ashoff. First, Ashoff argued that other environmental statutes such as the CWA and Clean Air Act (CAA)<sup>n16</sup> set up a similar relationship between the state and federal government, and that under each of those statutes citizens can sue on the basis of more stringent state standards.<sup>n17</sup> However, the court differentiated the two statutes from RCRA. Unlike RCRA, the CWA explicitly requests that states create more stringent standards<sup>n18</sup> and then specifically incorporates such orders issued by a state<sup>n19</sup> and state permit programs<sup>n20</sup> into the citizen suit provision. The CAA also explicitly mentions state orders<sup>n21</sup> as well as standards created by a state permit program<sup>n22</sup> in its citizens suit provision.

Ashoff also argued that limiting claims to those based on the federal minimum criteria would allow landfill owners to defeat RCRA citizen suits because they could argue in every case that the state standard was more stringent. However, the court felt that such a result would be unlikely and deemed such considerations insufficient to overcome the legally correct [\*582] interpretation of the statute. The Ninth Circuit then buttressed its conclusion with policy considerations, including the desire to avoid inappropriately interfering with state sovereignty. The court noted that the state statute upon which Ashoff based his suit did not allow citizen suits, but instead, required that citizens pursue their grievances through administrative procedures. Therefore, the court concluded that allowing citizens to bring suit in federal court would not only limit the flexibility of states to choose the forum for enforcement of their laws, but it might also chill states from adopting more stringent standards under RCRA. Based on these policy considerations as well as statutory interpretation, the Ninth Circuit affirmed the lower court's decision to dismiss the RCRA claim.

## 2. *Atchison, Topeka, & Santa Fe Railway Co. v. Brown & Bryant, Inc.*, 132 F.3d 1295 (9th Cir. 1997).

Railroad companies Atchison, Topeka & Santa Fe Railway Company and Southern Pacific Transportation Company (Railroads) brought a contribution action under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).<sup>n23</sup> The Railroads sought contribution for costs due to soil contamination on property they leased to Brown & Bryant (B&B). However, contribution was not sought from B&B but from PureGro, a purchaser of many B&B assets. The Ninth Circuit held that PureGro was not liable for contribution because it was not the "successor-in-interest" under either the "substantial continuation" or "fraudulently entered transaction" exceptions providing successor liability.

B&B operated an agricultural chemical business on property leased from the Railroads. However, upon realizing it could not meet compliance orders issued by the Environmental Protection Agency (EPA), it sold about half of its equipment to PureGro, a competitor in the same business. The equipment sale agreement provided that the purchase was not a purchase of B&B's business and that PureGro was not a de jure or de facto successor. In another sale agreement, PureGro purchased tanks and trailers from B&B's sole shareholder, John Brown.

After these purchases, PureGro and Brown entered into a consulting agreement whereby PureGro retained Brown to help acquire and maintain the prior B&B customers and to assist in the solicitation of new business. PureGro also hired all of B&B's employees, including Brown. For a short time after the asset sale, PureGro occasionally bought fertilizer from B&B. Eventually, PureGro took over B&B's telephone numbers. One local newspaper reported that B&B had "joined" PureGro.

In analyzing whether PureGro was liable as a successor-in-interest, the Ninth Circuit began with the general rule that asset purchasers ordinarily do not incur successor liability. However, the Railroads argued that PureGro was liable under two exceptions to this rule, namely the "sub [\*583]stantial continuation" or the existing "fraudulently-entered transaction" exception.

The "substantial continuation" exception expands the "mere continuation" exception to allow the imposition of successor liability if the purchasing corporation is substantially, as opposed to merely, a continuation of the selling corporation. This broader exception had not been adopted in the Ninth Circuit, yet the Railroads argued that the Ninth Circuit should use its powers under federal common law to expand CERCLA liability by adding this exception. The Ninth Circuit examined its prior holding in *Louisiana-Pacific Corp. v. Asarco*,<sup>n24</sup> which left open the availability of the broader exception. In *Louisiana-Pacific*, the Ninth Circuit had stressed the need for uniform federal rules for successor liability. However, in the case at hand, the Ninth Circuit found *Louisiana-Pacific* to be undermined by a line of Supreme Court cases which stressed that state law determines the scope of successor liability.<sup>n25</sup> Therefore, the Ninth Circuit rejected the creation of the "substantial continuation" exception because California state law provided no such exception. The Ninth Circuit further held that even under federal law, it would not create such an exception because state law was adequate to further CERCLA's goals.

The "fraudulently-entered transaction" exception subjects an asset purchaser to successor liability if the transaction was entered into in order to escape liability. On the facts of the case, the Ninth Circuit found that the sale did not provide B&B a means of escaping liability. B&B had insufficient assets even before the sale. Nor did the parties enter the sale solely to circumvent CERCLA liability. The court noted that the appraised value was paid for each item sold and that there was no agreement between B&B and PureGro forcing PureGro to hire B&B's employees. Thus, the Ninth Circuit held that this exception was not applicable to the present controversy.

### 3. *California v. Montrose Chemical Corp. of California*, 104 F.3d 1507 (9th Cir. 1997).

Defendant Montrose Chemical Corporation operated a DDT manufacturing plant in Torrance, California. The governments of California and the United States (Trustees) claimed that Montrose released 5.5 million pounds of DDT between 1947 and 1982 into Los Angeles and Long Beach Harbors, allegedly harming the marine environment. In the present case, the Trustees brought suit under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)<sup>n26</sup> to recover for natural resources damage to the marine environment as well as response costs incurred in the cleanup of the Montrose site. The defendants filed a motion for summary judgment as to the natural resources damage action based on CERCLA's statute of limitations. A special master denied [\*584] the motion, but the district court subsequently granted it. The defendants also filed a motion in limine, asking for a cap on liability of fifty million dollars plus response costs. The special master again denied their motion, but the district court sent it back for reconsideration. The motion came back to the district court, and this time the court ordered the parties to submit a written order. After the parties failed to agree on an order, the court entered its own order limiting liability to fifty million dollars plus response costs. The plaintiffs appealed.

On appeal, the Ninth Circuit first held that the Trustees had timely filed the action, and thus the statute of limitations did not preclude any of their claims. According to CERCLA, the statute of limitations began to run on "the date on which regulations [were] promulgated."<sup>n27</sup> According to the court, the statute of limitations began to run once all regulations required under section 9651(c) were promulgated, including regulations for simplified assessments and for alternative protocols for conducting assessments. Therefore, March 20, 1987, the date when the final regulations were promulgated, was the date the statute of limitations began to run. Because the government filed the case within three years of that date, the action was timely.

Second, the Ninth Circuit held that the term "incident involving release" is not a term of art meaning "contaminated site." Rather, it includes a series of events over a short period of time that lead to a spill of a hazardous substance. The significance is that liability for each incident involving release is capped at fifty million dollars plus response costs. The Ninth Circuit held that the section of the statute capping liability did not limit collective liability for all releases. Rather, one's liability for each release of a substance is capped at a different amount. Further, the court held that the record was insufficient to decide whether there was only one incident involving release and left the decision for further proceedings. For these reasons, the court reversed the district court's grant of summary judgment and its order limiting liability to fifty million dollars plus response costs.

### 4. *Enron Oil Trading & Transportation Co. v. Walbrook Ins.*, 132 F.3d 526 (9th Cir. 1997).

Enron Oil Trading & Transportation Company brought a state indemnification action against its excess insurer under a commercial general liability policy. After the defendant removed the case to federal court, the District Court for the District of Montana granted the defendant's motion for judgment on the pleadings. The Ninth Circuit held that public policy in Montana did not entitle the insurer-defendant to judgment on the pleadings. The Ninth Circuit also held that the policy's pollution exclusion was not a bar to the indemnity action.

The underlying dispute was between Ashland Oil Company (Ashland) and Enron Oil Trading & Transportation Company (Enron). Ashland alleged that it had suffered damage as a result of the injection of a foreign [\*585] substance (B-G mix) into the pipeline carrying crude oil to Ashland's refinery. Ashland claimed negligence, strict liability, breach of contract and warranty, fraud,

and tariff violations. Prior to trial, Enron settled the dispute for \$ 5 million. Enron's primary insurer provided the defense and contributed \$ 500,000. Enron's excess insurer, however, refused to participate. Enron brought a subsequent action against the excess insurer.

After removing the case to federal court, the excess insurer claimed that Enron's action was barred by the insurance policy's pollution exclusion and by Montana's public policy that barred recovery by insureds of indemnity for intentional acts. The District of Montana granted the insurer's claim on the public policy grounds. The Ninth Circuit reviewed the district court's grant of judgment on the pleadings de novo and held that Montana public policy did not afford the insurer-defendant a valid defense. Ashland's underlying action against Enron contained negligence and strict liability aspects that were not barred by public policy. Consistent with the theory of notice pleadings, Enron did not have to allege in its complaint the evidentiary facts in support of its own theory of recovery against its insurer. Accordingly, even if Montana's public policy would provide the insurer a defense, judgment for the insurer on the pleadings was improper.

Turning next to the issue of the pollution exclusion, the Ninth Circuit held that the exclusion would not bar Enron's action against the insurer. The insurer claimed that Montana law was unambiguous, and "contamination" included Enron's injection of "B-G mix" into the Ashland oil pipeline. According to the insurer, such injection rendered the oil "impure, less valuable and less useful." <sup>n28</sup> The Ninth Circuit noted that a Montana insurance clause is considered ambiguous when different persons looking at the clause in light of its purpose cannot agree upon its meaning. The court went on to note that adoption of the insurer's interpretation of the pollution exclusion would lead to virtually limitless results. <sup>n29</sup>

Policy considerations also favored denying the insurer's motion for judgment on the pleadings. For example, ambiguities in insurance policies, exclusions, and words of limitation are generally construed against the insurer because they are directly contrary to the fundamental protective purpose of insurance policies. Therefore, the Ninth Circuit concluded that the specific pollution exclusion dealt with environmental-type harms and not those of the nature before the court. The Ninth Circuit reversed the district court's grant of judgment on the pleadings and remanded the case for further proceedings.

[\*586]

#### 5. Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298 (9th Cir. 1997).

Three mining companies collectively known as the "Pinal Creek Group" engaged in the voluntary cleanup of the Pinal Creek Drainage Basin near the towns of Globe and Miami, Arizona. In 1991, the Pinal Creek Group filed suit against other potentially responsible parties (PRPs), bringing cost recovery and contribution actions under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). <sup>n30</sup> The defendants moved to dismiss the claims, which sought to impose on them joint and several liability for all response costs incurred by the Pinal Group, but the district court denied the motion. However, the court certified its order for an immediate interlocutory appeal. The Ninth Circuit granted the petition and reversed the lower court's denial of the motion to dismiss.

The Ninth Circuit reviewed the district court's interpretation of CERCLA de novo. On appeal, the Ninth Circuit held that section 107 is the source of CERCLA liability, while section 113 creates a mechanism for apportioning that liability among responsible parties. Thus, a PRP's claim for recovery of cleanup costs is necessarily one for contribution, and that party's liability will correspond to its equitable share of the total liability. The court acknowledged that the statutory text creates a duality by first making a PRP liable for its cleanup costs, and then allowing "any other person" to hold other PRPs liable for those same costs. The court concluded that this duality should be implemented by permitting a PRP who has incurred cleanup costs to assert only a contribution claim against other PRPs. The court found support for this conclusion by examining the legislative history behind section 113(f), which includes comments that Congress, in enacting the provision, was only confirming and clarifying an existing claim for contribution. <sup>n31</sup> The court also noted that even before Congress enacted section 113(f), most courts had held that section 107 implicitly incorporates a claim for contribution. <sup>n32</sup> Further, the Supreme Court and five federal circuits have reached similar conclusions that a CERCLA claim among PRPs is necessarily one for contribution. <sup>n33</sup> At the least, other courts have held that a PRP conducting cleanup operations can not avoid the effects of section 113(f), including its delay, burden of [\*587] proof rules, statute of limitations, and equitable allocation of orphan shares. <sup>n34</sup>

Practically speaking, the Ninth Circuit pointed out that if it holds a group of defendant-PRPs jointly and severally liable, that group would end up absorbing all of the costs attributable to orphan shares (shares attributable to PRPs who are insolvent or cannot be located or identified). This would substantially restrict the court's ability to apportion costs equitably among all PRPs. In contrast, under section 113(f)(1), the court can equitably distribute the costs of orphan shares among all PRPs, as is done with cleanup costs. <sup>n35</sup>

In addition, the court expressed concern that even a modified rule of joint and several liability of defendant-PRPs (where orphan shares are borne equally) would result in a chain reaction of multiple and unnecessary lawsuits. Such an approach, in its view, would guarantee inefficiency, potential duplication, and prolonged litigation. Finally, the court rejected policy considerations of promoting rapid and voluntary environmental responses by private parties in light of the text, structure, and logic of CERCLA, and the precedent set in *In re Dant & Russell, Inc.*, <sup>n36</sup> a case in which the Ninth Circuit held that a PRP could only assert a claim of contribution. The

court also named other incentives for PRPs to promptly conduct cleanup operations, namely, maintaining ongoing operations and asserting control over cleanup costs. Thus, the Ninth Circuit rejected joint and several liability for PRPs and reversed the district court's holding that PRPs could assert cost recovery actions other than those for contribution.

6. *Reese v. Travelers Insurance Co.*, 129 F.3d 1056 (9th Cir. 1997).

An officer of a metal reclamation company sued the company's insurer, which refused to defend the company in a liability suit. The insurer refused to defend based on both an owned-property exclusion and a pollution exclusion contained in the company's policies. The Ninth Circuit held that the insurer had a duty to defend because the company had potential liability under a claim for groundwater contamination, which was conceded by the insurer not to be excluded under the policies' owned-property exclusions. Also, the insurer failed to show conclusively that the pollution was intentionally or negligently created, and therefore covered by the pollution exclusion.

Keystone Metal Co., a metals reclamation company, rented commercial property from John Chrisman from 1970-1985. In the course of Keystone's operation, Keystone released residual wastes into the soil and [\*588] environment on Chrisman's property. Chrisman brought suit against the officers and directors of Keystone, including Robert Reese.

Travelers Insurance Co. issued four comprehensive general liability policies to Keystone, covering the years 1981-1985. These policies promised to defend Keystone and its officers and directors in their official capacities against any suit resulting in bodily injury or property damage, even if the allegations proved to be meritless. Travelers initially agreed to provide a defense in the action brought by Chrisman, but later concluded that it had no obligation to defend Keystone or its officers and withdrew its defense.

Reese filed suit in a third party complaint seeking indemnity from the claims, a declaratory judgment stating that Travelers had a duty to defend and a duty to indemnify, and a breach of an implied covenant of good faith and fair dealing. The district court granted summary judgment to Travelers, relieving it of its duty to defend, and Reese appealed.

The Ninth Circuit held that Travelers had a duty to defend Reese. In order to prevail at the summary judgment stage, Reese had to prove that there was a potential for coverage under the policies, while Travelers had to show a lack of such potential. Travelers alleged that the policy contained the following two exclusions that proved there was no potential coverage: 1) an owned-property exclusion; and 2) a pollution exclusion.

The owned-property exclusion in the policies exempted coverage of property damage that occurred on property owned or rented by Keystone. Travelers produced evidence gathered during discovery that the contamination was limited to the immediate property and that there was no threat of groundwater contamination. The Ninth Circuit pointed out that the allegations against Keystone included property damage beyond the Keystone site. The Ninth Circuit held that Travelers' duty to defend remained intact as long as the complaint contained language creating the potential of a liability. The Ninth Circuit explained that the relevant question was not whether the claims had merit, but whether the policies required Travelers to defend against such claims. Because Chrisman's complaint included the possibility of off-site liability, Travelers had a duty to defend.

The pollution exclusion contained in the policies excluded coverage for damage arising from pollution if the pollution was expected or intended by the insured party. Travelers presented evidence demonstrating that Keystone's officers were aware of the Keystone operations causing pollution. The court noted that the complaint did not specify if any of the defendants negligently or intentionally caused the pollution. California law does not presume that all pollution from the disposal of toxic wastes is nonaccidental. Because the complaint covered accidental spillage, exposure to liability outside of the pollution exemption was a possibility; therefore, Travelers had retained a duty to defend. Accordingly, the Ninth Circuit reversed the district court's grant of summary judgment for Travelers and granted summary judgment to Reese on the question of Travelers' duty to defend the underlying action.

[\*589]

C. National Environmental Policy Act

1. *Alaska Center for the Environment v. Armbrister*, 131 F.3d 1285 (9th Cir. 1997).

The Alaska Department of Transportation and Federal Highway Administration (FHA) proposed construction of a road to Whittier, Alaska to replace the twelve mile railroad that connected the town with the state's highway system. In 1995, the agencies published a combined final environmental impact statement (EIS) and draft section 4(f) evaluation for the Whittier Access Project. The EIS analyzed four alternatives for improving access to Whittier, including a no action alternative, improved rail service, and two road alternatives. In 1996, FHA issued a Record of Decision selecting one of the road alternatives for implementation, concluding that only the road alternatives met the purpose and need for the project.

Environmental groups and wilderness tour operators (collectively referred to as Alaska Center for the Environment, or ACE) brought suit alleging that FHA had violated section 4(f) of the Department of Transportation Act, <sup>n37</sup> section 138 of the Federal-Aid

Highway Act,<sup>n38</sup> and the National Environmental Policy Act (NEPA).<sup>n39</sup> Section 4(f) proscribes federal agencies from approving transportation projects that require the use of a public park or recreational area unless there is no feasible and prudent alternative to using the land, and the project includes all possible planning to minimize harm to the public land.<sup>n40</sup> ACE argued that improving the existing rail service was a prudent and feasible alternative to constructing the road, and that the EIS violated NEPA because it did not adequately address the safety hazards associated with the use of a road to Whittier.

The district court granted FHA's motion for summary judgment, concluding that the agency had not acted arbitrarily in deciding that improved rail access was not a prudent and feasible alternative to the proposed road. The Ninth Circuit affirmed, relying heavily on its previous decision in *Arizona Past & Future Foundation v. Lewis*,<sup>n41</sup> in which the court held that avoidance alternatives that did not accomplish the purposes of a project could be rejected as imprudent.

The Ninth Circuit reviewed FHA's reasons for determining that the rail service was imprudent. FHA had projected that demand for the road to Whittier far exceeded demand for the train because people were more likely to drive their cars than to ride trains, and therefore the improved rail service alternative did not satisfy the project's purpose of meeting the projected demand for access. FHA also concluded that increased rail service posed potential safety risks because the entrance to one rail tunnel was prone to avalanches, and tracks were subject to unsafe ice buildup. Be [\*590] cause rail service did not meet the agency's stated purposes of the project, the Ninth Circuit concluded that the agency properly rejected the alternative.

ACE argued that, consistent with the Ninth Circuit's ruling in *Stop H-3 Ass'n v. Dole*,<sup>n42</sup> FHA was required to identify unique problems or truly unusual factors supporting rejection of the rail alternative. The Ninth Circuit distinguished the facts in the case at hand from *Stop H-3*. The court explained that in *Stop H-3* all avoidance alternatives met the purposes of the project, while in the current case, FHA rejected the raiisystem alternative because it did not satisfy the purposes of a project. Under the standard developed by the Supreme Court in *Citizens to Preserve Overton Park v. Volpe*,<sup>n43</sup> the agency must only go further and find truly unusual factors when the rejected alternative would satisfy the purpose of the project without using public park or recreational land.

The Ninth Circuit also dismissed ACE's NEPA claim. ACE argued that the EIS failed to adequately address the safety concerns associated with the road and rail alternatives. The court found that this claim was not supported by the record because the EIS had thoroughly examined the relative safety risks of the different alternatives and specified mitigating measures. The Ninth Circuit also dismissed ACE's claim that the FHA defined the purpose of the project too narrowly. The court concluded that the purpose, namely to meet the demand for access to Whittier, was not defined so narrowly as to disqualify all alternatives except those to build a road.

2. *Apache Survival Coalition v. United States*, 118 F.3d 663 (9th Cir. 1997), *infra* Part III.

3. *Association of Public Agency Customers v. Bonneville Power Administration*, 126 F.3d 1158 (9th Cir. 1997).

Various industrial and environmental groups petitioned for review of decisions by Bonneville Power Administration to adopt a market driven business plan, execute power sale contracts with direct service industrial customers (DSIs), and extend transmission agreements to those customers. DSIs are industrial companies who purchase power directly from BPA for their own power intensive operations. In order to respond to changes in the electricity market, BPA developed a new strategy that required profound changes in its business relationship with DSIs. The Ninth Circuit considered a consolidated appeal involving challenges to the administrative decisions relating to BPA's new strategy.

For most of its history, BPA has had a significant price advantage over its competitors in the power market; its low cost power and control of most of the transmission lines in the region made it the top power sup [\*591] plier in the Pacific Northwest. Due to changes in federal law, BPA began to lose its price advantage in the early 1990s. With the Energy Policy Act of 1992,<sup>n44</sup> Congress sought to promote competition in the wholesale power market. It did this in part by giving power producers who lack their own transmission system the ability to request that the Federal Energy Regulatory Council (FERC) order transmission line owners to transmit power for them. Transmitting power produced by other generators is known as "wheeling." At the same time that wheeling was creating new competition in the wholesale power market, BPA's power costs were rising because of increases in the cost of its fish and wildlife programs.

BPA took several steps in response to these changes in the market, including the actions challenged by the plaintiffs. For instance, BPA adopted a market-driven approach to power management in their 1995 Business Plan Final Environmental Impact Statement Record of Decision (Business Plan ROD) after preparing an environmental impact statement. Subsequently, BPA fashioned sales contracts tiered off of the Business Plan. In September, 1995 BPA issued the Direct Service Industrial Customer Requirements Power Sales Contract Record of Decision (Block Sale ROD). The Block Sale ROD involved contracts with the DSIs for purchase of power on a "take-or-pay basis," which required the customer to pay for the power for which she contracted even if she did not take delivery. The Block Sale ROD also provided stranded cost protection. Previously, BPA's contracts with the DSIs contained stranded cost provisions allowing BPA to recover costs from a DSI that were incurred when the DSI terminated its contract. The new agreement guaranteed that there would be no stranded costs, because BPA would secure enough revenue to meet all of its operating costs and compete successfully so that investments never became stranded.

In April of 1995, BPA began entering into five-year contracts in which BPA would sell "unbundled" transmission service to

DSIs. The service was termed "unbundled" because previously BPA had only transmitted power which it produced, and traditionally this power was "bundled" with transmission service. The new contracts were the mechanism for BPA to wheel power to DSIs. In August of 1995, BPA and the DSIs agreed to extend the terms of the Initial Transmission Agreements arranged under the Block Sale ROD. BPA issued the Long-Term Extension Record of Decision (Long-Term Extension ROD), extending the term of the Initial Transmission Agreement by fifteen years, for a total of twenty years. Three entities then filed petitions of review challenging that decision.

The Association of Public Agency Customers (APAC), representing companies that purchased large amounts of electric power from BPA's public agency customers, filed a petition for review of the Business Plan ROD, the Block Sale ROD, and the Long-Term Extension ROD. The Utility Reform Project, a nonprofit environmental and energy policy advocacy organization representing Oregon and Washington residents whose power comes from BPA, and the Public Power Council, also filed petitions for [\*592] review of the Long-Term Extension ROD. A group of DSIs, the State of Oregon, and the Northwest Conservation Act Coalition (NCAC), a consortium of over seventy ratepayer and environmental groups, public and private utilities, and individuals, were allowed to intervene. The Utility Reform Project and Kevin Bell, a member of the Utility Reform Project, also filed for review of the Block Sale ROD, and some DSIs, NCAC, and Public Utility District No. 1 of Clark County, Washington were allowed to intervene.

The petitioners argued the following: 1) BPA did not have the statutory authority to wheel nonfederal power, 2) BPA failed to comply with NEPA, 3) BPA was arbitrary and capricious in granting stranded cost protection to the DSIs in the Block Sale Contracts, 4) BPA was arbitrary and capricious in granting the Long-Term Extension Agreements, 5) BPA violated the ratemaking procedures mandated by statute, and 6) the Long-Term Extension Agreements interfered with the state's regulation of retail power sales.

The Ninth Circuit first considered challenges to the Long-Term Extension Agreements. The court held that BPA did have the statutory authority to transmit nonfederal power. BPA argued that it was reasonable to interpret its governing statutes as a grant of authority to transmit nonfederal power. The agency supported its interpretation with the argument that four organic statutes granted BPA broad discretion over the Northwest's federal transmission system, did not limit BPA's ability to provide transmission services to DSIs, and conferred broad authority to contract in BPA's best interest.<sup>n45</sup> The Ninth Circuit held that where Congress has not spoken on an issue, the court should defer to the agency's construction of its governing statute, so long as its construction is reasonable.<sup>n46</sup> The Ninth Circuit discussed each of BPA's four organic statutes, including the Project Act, the Preference Act, the Transmission Act, and the Northwest Power Act, and concluded that the agency's interpretation was reasonable.

APAC and the Public Power Council argued that because the Transmission Act prohibited discrimination among retail power consumers,<sup>n47</sup> BPA was precluded from wheeling non-federal power to the DSIs without also offering the same to APAC's members. The Ninth Circuit disagreed, concluding that the antidiscrimination language in the statute applied only to discrimination among utilities. The court also dismissed a discrimination argument based on the Federal Power Act,<sup>n48</sup> which prohibited BPA's rates for transmission services from being "unjust, unreasonable, or un [\*593] duly discriminatory or preferential."<sup>n49</sup> In order to successfully advance a discrimination claim under the Federal Power Act, the Ninth Circuit held that APAC had to show that its members were similarly situated to the DSIs and that there was disparate treatment for the same service. The court found that APAC's members and the DSIs were not similarly situated. While the DSIs contracted directly with BPA and could cancel their agreements with one year of notice, APAC's members contracted with utilities that purchase power from BPA under contracts requiring seven years of notice for cancellation. Because of this distinction, BPA had to act to keep the DSIs from canceling their contracts, but this was not unlawful discrimination.

APAC argued that BPA failed to consider the impact of its decisions on competition, as required by the Project Act.<sup>n50</sup> The Ninth Circuit found that the whole thrust of BPA's planning process over the past few years had been to focus on market competition. Therefore, the court found that the Long-Term Extension Agreements furthered, rather than frustrated, the purpose of antitrust laws.

The State of Oregon argued that the Long-Term Extension Agreements interfered with the state's regulatory authority. The Ninth Circuit held that while the power to regulate retail sales of power is generally left to the states, the states do not have the authority, absent clear congressional direction, to regulate transmission lines owned by a federal agency such as BPA.<sup>n51</sup> The court also dismissed Oregon's concerns about load-shifting, concluding that these matters were not germane to its review because interstate transmission is clearly a federal matter.

The Ninth Circuit then considered claims that the transmission agreements did not comply with 42 U.S.C. 4332(2)(E), a provision of the National Environmental Policy Act (NEPA) that requires federal agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources."<sup>n52</sup> This requirement is separate and independent of the requirement to prepare an EIS and applies to a wider range of federal actions.<sup>n53</sup> The court held that BPA had complied with this provision by considering several alternatives to long-term wheeling for DSIs.

APAC argued that BPA's decision to grant the long-term transmission contracts was an arbitrary and capricious departure from established precedent, and the decision was not supported by the record. The court reviewed the record and found that BPA's decision was amply supported. [\*594] The court emphasized that BPA's objective was providing stability reserves for its entire system, and

was not persuaded by arguments challenging the soundness of BPA's business strategy. The Public Power Council argued that BPA had contractually diminished the utilities' statutory rights to BPA's excess transmission capacity as guaranteed by the Transmission Act. <sup>n54</sup> The court found that if this claim were valid, the aggrieved party would have a remedy. The potential for such future litigation did not sufficiently convince the court that BPA acted arbitrarily or capriciously.

The Ninth Circuit next considered petitions for review of the Block Sale contracts. The Northwest Power Act created a process for establishing rates, <sup>n55</sup> which the petitioners argued was violated by the Block Sale. Section 7(i) of the Northwest Power Act requires the Administrator of BPA to publish notice of a proposed rate change in the Federal Register and then conduct public hearings to develop a complete record on which to base the final rate. <sup>n56</sup> Any final rate must be approved by FERC. <sup>n57</sup>

At the time the Block Sale Contracts were issued, BPA was concerned that if it did not act quickly, the DSIs would cancel their contracts and purchase power from other generators in the market. Section 7(i) proceedings had been initiated, therefore the contracts were based on a rate target rather than an actual rate. This created a "rate test." Once the 7(i) proceedings were complete, if the rate met the rate target, then the contracts would stand. If the rate exceeded the rate target, then the DSIs had several options, ranging from canceling their contracts outright to purchasing power at the approved rate. Petitioners argued that the term "rate" should be defined to include terms of any contract that affects the rate, and therefore the section 7(i) process should have been carried out for the Block Sale Contracts. BPA defined rate only as a monetary charge for the sale of electricity, and therefore the term did not include terms and conditions that did not establish such monetary charges. The court found that BPA's definition of rate was reasonable. The court referred to its rejection of a similar attempt to expand the definition of rate in *California Energy Resources Conservation & Development Commission v. Bonneville Power Administration*. <sup>n58</sup> In that case the plaintiff argued that a new Intertie access policy was a ratemaking requiring FERC approval. The court found that the policy was not a charge imposed on customers for the provision of electrical power, and therefore was not a rate. Furthermore, the court noted that every contract will have terms that materially affect the bargain, but the Northwest Power Act does not require the BPA to carry out section 7(i) proceedings whenever it enters into a contract.

The petitioners next argued that even if the terms and conditions of a contract are not by themselves subject to section 7(i) procedures, such contractual terms can sometimes be so closely tied to the rate as to require [\*595] consideration when ratemaking. <sup>n59</sup> The Ninth Circuit dismissed this claim, holding that while the plaintiffs' general proposition might be true, in this case none of the terms of the contracts were sufficiently intertwined with the rate to modify the price paid for power.

Clark County argued that the rate test used in the Block Sale contracts in lieu of a rate constituted a ratemaking outside of a section 7(i) proceeding, or a "rate case." Clark County argued that this rate test created a ceiling above which the Administrator would not go for fear of losing the DSI contracts. Therefore, Clark County argued, the rate test would improperly influence the outcome of the rate case. The Ninth Circuit held that this claim was not ripe and instructed Clark County to raise the claim either in the rate case when the rate was up for FERC approval, or in court after FERC granted approval.

The Ninth Circuit also dismissed the petitioners' argument that the Block Sale Contracts violated the Transmission Act's antidiscrimination provision. The court found that its holding with regard to the Long-Term Extension Agreements applied to the Block Sale Contracts as well.

The Ninth Circuit then gave a detailed account of the record and held that it did not support the argument that BPA acted arbitrarily and capriciously in granting the Block Sale Contracts. While the court did not endorse the BPA's business strategy, it found that the likelihood of its success was beyond the court's review.

The Ninth Circuit then turned to the challenges brought under NEPA. The court first considered the timeliness of APAC's petition challenging the Business Plan. The Northwest Power Act requires that parties challenging a final BPA action file suit within ninety days of the time such action is final. <sup>n60</sup> APAC filed its petition more than ninety days after the Business Plan was executed, but within ninety days of publication of the Business Plan in the Federal Register. The court found that the petition was untimely unless publication was required by the Northwest Power Act, which it is not. However, the court concluded that because APAC had insufficient warning that the time for the appeal began to run at the time the plan was executed, rather than published, its decision on the matter would be prospective only. The Ninth Circuit then proceeded to consider the merits of APAC's petition.

Petitioners argued that BPA could not tier the ROD for specific contracts to the Business Plan EIS, but instead had to issue an individual EIS for each contract ROD. However, the court concluded that in many ways a programmatic EIS is superior to a contract-specific EIS because it considers an entire policy. Therefore, BPA did not err by issuing a single programmatic EIS.

The Ninth Circuit considered the petitioners' claim that BPA had failed to consider the cumulative impacts of the Initial Transmission [\*596] Agreements, Block Sale Contracts, and Long-Term Extension Agreements in the Business Plan EIS. The Business Plan included an analysis of a market-driven alternative, which was selected as the proposed action. The court found that this market approach adequately considered the cumulative impacts of the three arguments.

Petitioners also challenged the decisionmaking process, arguing that the closed door negotiations with the DSIs over the new

contracts were not subject to proper public scrutiny or comment. The court held that the NEPA process did not have to precede the agency's formulation of a proposal or selection of a preferred course of action. The court also dismissed the petitioners' claim that the EIS should have included more alternatives to the stranded cost protection provision.

The Ninth Circuit next dismissed the petitioners' claim that the EIS did not adequately consider the environmental consequences of the transmission agreements and stranded costs protection. The court found that BPA had considered such consequences to the market, power supply, and fish and wildlife. The petitioners argued that the Business Plan EIS failed to consider the social effects that could result from utilities being liable for higher stranded costs, which inevitably would be passed on to ratepayers. The court held that NEPA did not require BPA to consider the economic impact of its actions because the statute only required consideration of environmental factors. The court also rejected the argument that ratepayers, particularly those in low socio-economic strata, would be significantly effected by BPA's actions. The court also dismissed claims that the EIS did not adequately address impacts on area aluminum smelters.

Petitioners argued that BPA failed to adequately address mitigation. The court disagreed, holding that the EIS had considered mitigation for each resource type. The petitioners also argued that the EIS failed to consider the long-term environmental effects of the action, focusing instead on a time period ending in 2002. The court held that NEPA did not require any particular analytical protocol and that BPA had reasonably concluded that because long-term calculations were difficult to accurately make, it was better to focus on short-term analysis and assume that short term relationships would provide valid indications of the long run.

The court then concluded that the "no action" alternative did not require analysis of the consequences resulting from not signing any contracts with the DSIs. The court held that the no action alternative could be considered in terms of continuing the status quo.

Finally, the Ninth Circuit considered the claim that the Business Plan EIS was not consistent with the Business Plan. While the EIS only considered wheeling to DSIs, the Business Plan recognized the trend towards wheeling to retail customers and indicated BPA's willingness to shift in that direction. The court held that this potential inconsistency was not ripe because there was no injury. No contracts allowing retail wheeling had been issued, and the Business Plan did not actually commit the BPA to such a course of action. There was no harm to the environment from BPA [\*597] indicating a willingness to grant transmission access to retail customers in the future.

The court concluded that widespread changes in the electricity market resulting from deregulation had transformed the wholesale power market. The court held that BPA's response to these changes in the market was not arbitrary and capricious, and denied all petitions for review.

#### 4. Keith v. Volpe, 118 F.3d 1386 (9th Cir. 1997).

Robert L. Kudler, a billboard advertising developer, appealed the district court's entry of a preliminary injunction prohibiting the California Department of Transportation (Caltrans) from issuing him a permit to place billboards along the Interstate 105 freeway (I-105) in Los Angeles County. The district court injunction was granted when the plaintiffs, environmental and civil rights activists, sought to enforce a consent decree and environmental impact statement (EIS) resulting from earlier litigation on the I-105 project. The question for the Ninth Circuit was whether this federal consent decree properly barred construction of billboards on I-105.

The consent decree and EIS formed a settlement agreement whereby federal and state agencies were permitted to proceed with the construction of I-105 while mitigating negative aesthetic effects on motorists and surrounding neighborhoods. The consent decree required that I-105 be constructed as a landscaped freeway to create a park-like atmosphere. The issue on appeal was whether this consent decree superseded the California Outdoor Advertising Act (COAA),<sup>n61</sup> the state law regulating billboard placement.

From 1993 to 1996, Kudler applied for several permits authorizing him to place billboards along I-105. Caltrans denied all of these applications. Kudler wanted to place billboards along unplanted sections of the highway that were over 200 feet in length, and he also sought to have Caltrans reclassify these sections of the freeway as nonlandscaped. Caltrans denied these requests. Kudler then filed an action in state court seeking peremptory writs of mandate requiring Caltrans to reclassify the unplanted segments of the freeway as nonlandscaped and issue him permits to place billboards along those segments. Kudler argued that Caltrans had violated the COAA, which provides that permits to construct billboards shall be issued unless the billboard is to be constructed in a landscaped segment of the freeway. The law also mandates that a planted segment of the freeway must be at least 1000 feet in length to be classified as landscaped, and that if such a segment is followed by a gap of 200 feet or less and adjoins a planted section that is at least 500 feet in length, the "landscaped freeway" designation will apply to the planted segment, the gap, and the next planted segment.<sup>n62</sup> Kudler argued that because he sought to place billboards in unplanted segments of the freeway that were over 200 feet in length, Caltrans was required to issue him the permits. Caltrans believed [\*598] that the COAA was superseded by the consent decree, which prohibited erection of billboards along I-105.

On July 12, 1996, the Los Angeles Superior Court issued a peremptory writ of mandate requiring Caltrans to reclassify the disputed segments of I-105 as nonlandscaped and to grant Kudler permits to construct his billboards. The plaintiff groups then filed an ex parte application for an order to show cause why an injunction to enforce the consent decree should not issue and for a temporary restraining order in federal district court. After briefing and a hearing on the order to show cause, in which nonparty Kudler

participated, the district court ruled that the consent decree prohibited billboards anywhere along the freeway and granted a preliminary injunction preventing Caltrans from issuing Kudler's permits. Nonparty Kudler then appealed this decision to the Ninth Circuit.

The Ninth Circuit first considered whether it had subject matter jurisdiction and whether the parties had standing to bring this action both in district court and on appeal. Kudler argued that the district court did not have subject matter jurisdiction. The Ninth Circuit disagreed, citing *SEC v. G.C. George Securities, Inc.*,<sup>63</sup> where the court found that the district court could properly enjoin state administrative proceedings raising issues already resolved in a federal court settlement agreement. Also, the consent decree itself provided that the parties could apply to the district court for relief if any party failed to comply with the terms of the decree.

The Ninth Circuit determined that nonparty Kudler had standing to bring the appeal in the Ninth Circuit. Nonparties are permitted to appeal district court orders in the Ninth Circuit where the appellant participated in the district court proceedings, even though not a party, and the equities in the case weigh in favor of hearing the appeal. At the district court's request, Kudler had responded to the order to show cause by filing a memorandum of points and authorities and participating in oral argument. The Ninth Circuit found that equities clearly weighed in favor of Kudler's right to appeal because the plaintiffs had hailed him into the proceeding against his will and were then trying to prevent his appeal by arguing that he lacked standing.

The Ninth Circuit then turned to the merits of the case, concluding that the district court properly found that the consent decree and EIS prohibit billboards along I-105. The Ninth Circuit discussed the terms of the consent decree, which permitted construction of the freeway but required mitigating measures, including the order that I-105 be constructed as a landscaped freeway. The parties who negotiated the consent decree, and the district judge who had presided over the case for twenty-five years, agreed that the language of the consent decree precluded billboards along the freeway. The Ninth Circuit discussed some of the language of the consent decree and the EIS and concluded that substantial evidence supported the district court's finding that the consent decree's designation of I-105 as a landscaped freeway prohibited billboard construction.

[\*599] The Ninth Circuit then considered whether a contractual consent decree entered by a federal district court could supersede state laws regulating billboards, when those laws are not in conflict with any federal law. The Ninth Circuit held that while the district court correctly determined that the consent decree precluded billboard construction on I-105, it erred in concluding that the consent decree overrode state law. The district court lost sight of its limitations under the Constitution. The Ninth Circuit held that the district court could not supersede California law unless it conflicted with a federal law, and that in this case there were no conflicting federal laws that justified overriding state law. The district court had relied on the policy concerns of the National Environmental Policy Act of 1969 (NEPA),<sup>64</sup> but the Ninth Circuit held that because NEPA imposes only procedural requirements, and does not dictate a substantive environmental result, the district court erred in relying on NEPA's generalized environmental purpose.

The Ninth Circuit concluded that the parties to the consent decree did not have the authority to agree to terms that exceeded their authority under state law. The court cited a number of cases, including *Perkins v. City of Chicago Heights*,<sup>65</sup> for the proposition that the parties to a consent decree cannot agree to do something together that they lack the authority to do individually. The Ninth Circuit held that the doctrine of federalism precluded the district court from overriding valid state laws regulating outdoor advertising. The court reversed the district court decision and vacated the preliminary injunction.

##### 5. Marbled Murrelet v. Babbitt, 111 F.3d 1447 (9th Cir. 1997).

The Ninth Circuit vacated a district court injunction shutting down logging activities in Humboldt County, California. The court held that approval of eight timber harvest plans (THPs) by the California Department of Forestry and Fire Protection (CDF) constituted neither an "agency action" under the Endangered Species Act (ESA)<sup>66</sup> nor a "major federal action" under the National Environmental Policy Act (NEPA)<sup>67</sup> despite the fact that CDF consulted with the Fish and Wildlife Service (FWS) in approving the THPs.

The district court granted a motion by the Environment Protection Information Center (EPIC) to enjoin logging activities to be conducted under the THPs. The district court determined the following: 1) there were serious questions regarding violations of the ESA and NEPA; and 2) there was a balance of hardships tipping in EPIC's favor.

The Ninth Circuit declined to decide whether the district court had jurisdiction over the ESA claim because of EPIC's failure to give the sixty-day notice of intent to sue required by the ESA. EPIC contended that letters to the appellants prior to the sixty-day notice period constituted [\*600] proper notice. The Ninth Circuit decided the case on the merits, rendering the notice dispute moot.

Section 7(a)(2) of the ESA requires consultation between FWS and other federal agencies for any agency action. EPIC argued that CDF's consultation with FWS regarding eight THPs constituted agency action and should have triggered the agency consultation requirement of the ESA. California state law requires CDF approval of all THPs. CDF approval procedures allow someone submitting a THP to choose among seven options for providing information on spotted owl takings to the director of CDF. The appellants chose the option of providing to CDF an FWS opinion concluding that the timber plans would not likely result in the taking of an owl.

EPIC argued that this strategy involved a delegation of authority to FWS and that CDF's approval of the THPs hinged on the FWS opinion. EPIC cited a 1996 Ninth Circuit opinion holding that if a federal permit is a prerequisite for a project, the permit

issuance becomes a major federal action.<sup>n68</sup> The court disagreed, finding the decision to be exclusively the decision of CDF. The FWS concurrence was merely one of seven options available to the appellant and therefore was not a prerequisite for the project. The court pointed to a similar 1996 decision, *Marbled Murrelet v. Babbitt (Murrelet I)*,<sup>n69</sup> where FWS advice to lumber companies on how to avoid a "take" of a species under section 9 of the ESA was not determined to be an agency action. The court held in *Murrelet I* that agency involvement that does not influence private action is not an agency action. Reaching a similar conclusion in the present case, the court held that the FWS concurrence letter clearly indicated that the power to approve the THPs was left with CDF. In addition, the FWS concurrence did not put the agency in control of the THP approval process, and therefore did not create a delegation of authority from CDF to FWS. Because the FWS option was one of seven available to the appellants by state law, the court held there was no federal discretionary involvement in the approval process.

The court's holding that the FWS involvement was not an agency action led to the conclusion that the involvement also was not a major federal action under NEPA, because a major federal action under NEPA is determined under a more exclusive standard than an agency action under the ESA. Finding a violation of neither the ESA nor NEPA, the court vacated the district court decision and removed the injunction.

6. *Northwest Environmental Defense Center v. Bonneville Power Administration*, 117 F.3d 1520 (9th Cir. 1997), *infra* Part II.B.

7. *Oregon Natural Resources Council v. Lowe*, 109 F.3d 521 (9th Cir. 1997).

The Oregon Natural Resources Council (ONRC) and several other environmental groups brought an action alleging that the Forest Service [\*601] failed to comply with both the National Forest Management Act (NFMA)<sup>n70</sup> and the National Environmental Policy Act (NEPA)<sup>n71</sup> when it prepared and amended a land and resource management plan for Winema National Forest in southcentral Oregon. The Ninth Circuit approved the decisions and methods of the U.S. Forest Service (Forest Service) and affirmed the district court's grant of summary judgment in favor of the Forest Service.

This controversy involved the Winema National Forest Land and Resource Management Plan (LRMP) and a subsequent amendment to the LRMP. ONRC challenged the two planning decisions on the basis that the Forest Service did not comply with NFMA. NFMA directs the Secretary of the Forest Service to develop, maintain, and revise resource plans, and to issue regulations for the development and revision of forest plans.<sup>n72</sup> As part of a forest plan, wildlife habitat is managed to ensure viable populations and management indicator species (MIS) are selected and monitored. MIS population changes are believed to indicate the effects of management activities. The LRMP divided the forest into a number of management areas, one of which was designated to maintain old growth forests and old growth-associated species. Five MIS for the old growth area were selected from the Forest Service's regional plan for the Pacific Northwest.

ONRC also challenged the LRMP for failure to comply with NEPA. NEPA requires the preparation of an Environmental Impact Statement (EIS) for any major federal action "significantly affecting the quality of the human environment."<sup>n73</sup> Both a draft and a final EIS generally are prepared for LRMPs. In development of the Winema LRMP, areas of lands set aside as old growth were based on a previously prepared old growth inventory, and many of the tracts that were designated as old growth no longer contained old growth stands. Similarly, several areas contained old growth but were not designated as such. The Forest Service also selected a specific old growth stand to help fulfill the requirements for the MIS, but it failed to prepare a supplemental EIS. Instead, the Forest Service issued a finding of no significant impact and submitted a less demanding Environmental Assessment (EA).

ONRC challenged the LRMP for violating NFMA on two grounds. First, the group argued that the Forest Service erred in adopting MIS and management parameters from the regional plan, which was outdated and only intended to provide minimal legal requirements. Second, ONRC challenged the decision not to include the white-headed woodpecker as an MIS. The Ninth Circuit reviewed ONRC's NFMA challenges under the "arbitrary and capricious" standard set forth in the Administrative Procedure Act.<sup>n74</sup>

[\*602] The Ninth Circuit rejected all of ONRC's NFMA challenges. Although acknowledging that the data used to develop the regional plan dated back to the late seventies and early eighties, the Ninth Circuit did not believe that the studies cited were so outdated as to make the Forest Service's reliance upon them arbitrary and capricious. Also, even though the management strategies for the MIS were only intended to be minimums, the Ninth Circuit was unwilling to hold that the Forest Service violated NFMA when it adopted those strategies in the Winema Forest LRMP. Although ONRC had a report<sup>n75</sup> which supported their assertion that the management strategies were inadequate to protect the goshawk (one MIS), that document postdated both the LRMP and its challenged amendment. Thus, the Forest Service did not act in an arbitrary and capricious manner based on the information available at the time of the decision. On the final NFMA challenge, the Ninth Circuit held that it was not arbitrary and capricious to fail to designate the white-headed woodpecker as an MIS. The Forest Service asserted that the white-headed woodpecker was adequately protected through consideration of other MIS, such as the pileated woodpecker and the goshawk. Accordingly, the Ninth Circuit found no violation of NFMA.

ONRC also presented two claims challenging the LRMP for failing to comply with the requirements of NEPA. First, ONRC claimed that the LRMP violated NEPA because it was based on inadequate information about the actual location of existing old growth and because subsequent EISs were not completed as new information became available. Second, ONRC argued that the Forest

Service violated NEPA by not responding in the EIS to valid scientific criticisms. The Ninth Circuit reviewed the NEPA challenges to the LRMP under the "rule of reason" standard, which requires that the court determine whether the agency took a "hard look" at the decision's environmental consequences.

On the first challenge, the Ninth Circuit inquired whether the Forest Service's EIS was required to consider the environmental significance of size, configuration, and connectivity of old growth forest stands rather than simply specifying a quantity to be protected. The Ninth Circuit stressed that NEPA ensures a process and not a particular result. The court pointed out that the criticisms were not directed at the EIS, but were aimed at the LRMP itself. Because the specific factors ONRC claimed were missing from the EIS did not have to be included as long as the EIS fulfilled the purpose for which it was intended under NEPA, the Forest Service's failure to consider those factors was not arbitrary and capricious.

After evaluating ONRC's second NEPA challenge to the LRMP, the Ninth Circuit concluded that NEPA had not been violated for failure to consider scientific criticisms. In particular, ONRC referred to the testimony of biologists from the Oregon Department of Fish and Wildlife, the Klamath Tribe, and Winema. In response to ONRC's complaints that the response given by the Forest Service was inadequate to meet NEPA requirements, the Forest Service stated that it was constrained to operate under its regional guide. The Ninth Circuit declined to put itself into the [\*603] middle of the debate, and pointed out that the court's role is limited to ensuring that the agency took a "hard look" at the environmental consequences. Finding this standard met, the Ninth Circuit found no NEPA violation and accordingly affirmed the district court's grant of summary judgment for the Forest Service.

The dissent disagreed with the majority's determination that the failure to consider the specific land management factors of size, configuration, connectivity, and ecological condition was not a violation of NEPA. The dissent argued that it was a violation of NEPA to conduct an EIS based on an old timber inventory which did not accurately represent the location of old growth tracts. The Regional Forester himself had stressed the importance of considering such attributes of the forest when developing an LRMP. In addition, the Ninth Circuit previously held that a forest plan was unreasonable when it included no consideration of the configuration of old growth that was to be protected, <sup>n76</sup> and the dissent found the inadequacy of the presently contested EIS even more extreme. Accordingly, the dissent would have reversed the district court and remanded for an injunction of the Forest Service until such time as it was able to prepare an adequate EIS based on current, available data.

#### 8. Price Road Neighborhood Ass'n v. United States Department of Transportation, 113 F.3d 1505 (9th Cir. 1997).

An association of residents living near a proposed freeway interchange project brought action against the United States Department of Transportation (USDOT), Federal Highway Administration (FHA), and Arizona Department of Transportation (ADOT) alleging violations of the National Environmental Policy Act (NEPA), <sup>n77</sup> as well as the procedural requirements mandated by the Council on Environmental Quality (CEQ) and FHA, because defendants failed to conduct a supplemental environmental assessment (EA) after modifying the original interchange design. The plaintiff-appellants also claimed that the agencies failed to provide adequate public participation opportunities and that the agencies' decisions were based on an inadequate reevaluation, and therefore were arbitrary and capricious. The United States District Court for the District of Arizona granted summary judgment in favor of the defendants, and the plaintiffs appealed. The Ninth Circuit held the following: 1) NEPA requirements were satisfied through use of a reevaluation process rather than creation of a supplemental EA, 2) the fact that agencies did not hold additional meetings while conducting reevaluation of the original EA did not violate public participation requirements, and 3) the reevaluation was adequate, therefore the agencies' determination that the proposed redesign produced "no discernible differences" was not arbitrary and capricious.

The subject of the dispute was the partial redesign of the "Price Interchange" being built by ADOT in Tempe, Arizona. ADOT prepared an EA pursuant to NEPA in 1987 and 1988, and, after final review, issued a find [\*604] ing of no significant impact (FONSI) indicating that the proposal would have no significant effect on the human environment. The initially preferred design was a four-level, fully-directional interchange, which included two below-ground, fully enclosed tunnels. The tunnels were chosen at least in part to allay concerns of residents about the fifty-foot above-ground height of ramps in an earlier design, and reduced this height to twenty-five feet above ground.

In January 1995, ADOT informed FHA that it wanted to save construction and maintenance costs by modifying the initial design to include two fully directional loop ramps rather than the two tunnel ramps. The FHA required ADOT to conduct an environmental reevaluation in order to determine the continuing validity of the original EA and resulting FONSI. Subsequently, ADOT conducted a public meeting to inform the public of the proposed modifications, and eventually modified its proposal and adopted a semidirectional ramp design based on a plan submitted by a citizen. FHA eventually approved the environmental reevaluation, making the finding that there were no discernible differences in the level of environmental impacts when comparing the original design with the revised proposal. The Price Road Neighborhood Association (PRNA) then filed a complaint against USDOT and ADOT seeking declaratory and injunctive relief based on the claims above.

The Ninth Circuit held that the environmental reevaluation was an appropriate vehicle for FHA to determine the significance of impacts produced by the modified design in deciding whether a supplemental EA was required. While agreeing with the plaintiffs that an agency's NEPA responsibilities do not end with the initial assessment and that supplemental documentation is sometimes necessary, the Ninth Circuit noted that such documentation is only required when the environmental impacts not evaluated by the original analysis are either significant or uncertain. Therefore, the agency must first determine if the impacts resulting from the proposed change are significant before deciding whether supplemental documentation is necessary. As neither NEPA nor the

implementing regulations discuss how this determination is to be made, FHA had discretion to issue its own regulation providing for reevaluation of environmental documents. The court held that this reevaluation procedure satisfied the requirement that agencies take a "hard look" at the environmental consequences of their actions and not act on incomplete information.

The Ninth Circuit found that the reevaluation process did not violate explicit statutory and regulatory public participation requirements because ADOT held two public meetings to discuss the redesign of the interchange. Not only did residents voice their concerns at the meetings, but members of the public actively participated in the design process by submitting alternatives, one of which was adopted.

The court rejected PRNA's attempt to challenge the adequacy of the reevaluation by engaging in a battle of the experts. The plaintiffs sought to introduce their own studies with regard to several impacts, including air quality and noise, which contradicted the findings of the agencies, but the court noted that agencies have discretion to rely on their own qualified [\*605] experts when specialists disagree. In this case, the methodology used and conclusions reached by the agencies were supported by scientific data, therefore, the court found it reasonable for the agencies to rely on the opinions of their own experts.

#### D. Toxic Substances

1. *Coupar v. United States Department of Labor*, 105 F.3d 1263 (9th Cir. 1997), supra Part I.A.
2. *Industrial Truck Ass'n v. Henry*, 125 F.3d 1305 (9th Cir. 1997).

This case concerned preemption of state health and safety statute provisions and implementing regulations by federal Hazard Communications Standards (HCS) <sup>n78</sup> under the Occupational Safety and Health Act (OSHA). <sup>n79</sup> A truck manufacturer brought an action against the State of California seeking declaration that California Safe Drinking Water and Toxic Enforcement Act (Proposition 65) <sup>n80</sup> and its regulations were preempted by the federal HCS regarding warning requirements imposed on manufacturers and distributors of industrial trucks (forklift trucks).

OSHA authorizes the Secretary of Labor to promulgate federal occupational health and safety standards such as the HCS to protect workers from hazardous chemicals in the workplace. This standard applies to all sectors of the economy and establishes rules for the identification and evaluation of such chemicals as well as training procedures for handling them. OSHA also permits states to assume and maintain regulatory responsibility for areas covered by a federal standard promulgated under the Act, but to do so, a state must submit to the Occupational Safety and Health Administration (Administration) a "state plan" with proposed state standards. If the state plan is approved by the agency, the state standards displace applicable federal standards; if not approved, the state plan is preempted by the federal statute.

California's plan was first approved in 1973 and has since been modified and approved by the Administration several times. In 1986, California voters approved Proposition 65, which required the state to publish and maintain a list of chemicals known to cause cancer, birth defects, or other reproductive harm, and also prohibited any person doing business in the state from intentionally exposing individuals to those chemicals without a clear and reasonable warning prior to exposure. To implement this piece of legislation, the California Office of Environmental Health Hazard Assessment (OEHHA) promulgated regulations that provided specific warning methods (OEHHA Regs). <sup>n81</sup> These regulations went into effect in 1988 and 1989.

In 1990, labor and environmental groups concerned that the HCS promulgated under OSHA would preempt Proposition 65 successfully [\*606] sought a writ of mandamus from the California Court of Appeals ordering the California Occupational Safety and Health (Cal-OSH) Standards Board to incorporate the provisions of Proposition 65 into the State Plan and to submit the amended plan to the Administration for approval. To comply with the court's order, the board issued regulations seeking to incorporate Proposition 65 and the OEHHA Regs into the state plan (Title 8 Regs), <sup>n82</sup> which went into effect in 1991. The Administration recently approved the Proposition 65 modification to the state plan, subject to certain conditions. Therefore, California currently has two sets of regulations on its books dealing with Proposition 65 warnings: Title 8 Regs in the state plan and the OEHHA Regs.

In this action the plaintiffs, manufacturers and distributors of forklift trucks, alleged that enforcement of the warning provisions of Proposition 65 and the OEHHA Regs against industrial truck manufacturers was preempted under OSHA by the HCS, and sought declaratory and injunctive relief against the defendants, the Attorney General of California and the Director of OEHHA. The plaintiffs argued that the Title 8 Regs did not include all of the occupational provisions of the OEHHA Regs because Title 8 Regs expressly apply Proposition 65's warning requirements to "employers" of California workers, as compared to the OEHHA Regs, which apply to "any person in the course of doing business." <sup>n83</sup> Plaintiffs argued that under the Title 8 Regs, the State Plan does not apply warning requirements to manufacturers or distributors of industrial trucks beyond imposing an obligation to warn their own employees, while the OEHHA Regs do apply to such entities. Therefore, plaintiffs argued that the broader language of the OEHHA Regs and Proposition 65 itself is preempted by the HCS standard under OSHA, because the Title 8 language submitted and approved by the Administration in the state plan did not incorporate the broader language. Plaintiffs moved for summary judgment against enforcement of the nonapproved provisions. Defendants moved to dismiss, arguing that Title 8 Regs did include all of the warning requirements of Proposition 65 and the OEHHA Regs through incorporation by reference in an appendix to the Title 8 Regs, and therefore there was no preemption argument. The district court granted the defendants' motion to dismiss, but did not address whether Proposition 65 and

the OEHHA Regs had been fully incorporated into the state plan. In addition, the court held that even if the regulations were not included in the state plan, the OEHHA Regs would not be preempted by the federal HCS standard. The Ninth Circuit reversed on appeal, holding that OSHA and the HCS do preempt Proposition 65 and the OEHHA Regs.

The court relied on the Supreme Court holding in *Gade v. National Solid Waste Management Ass'n*<sup>n84</sup> that OSHA expressly manifests Congress's intent to preempt state law. The Gade court quoted section 667(b) of OSHA in holding that unless a state plan is submitted to the Administration, OSHA preempts "all state occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated."<sup>n85</sup> Therefore, even if state regulations do not conflict with the federal scheme, as long as they relate to the issue of the federal standard, they are still preempted by the standard. Accordingly, if a state submits some regulations on a worker safety issue to the Administration as part of its state plan and omits other regulations relating to the same issue, the omitted regulations, even if complementary to OSHA's scheme, will be preempted by the federal standard. Otherwise, state plan approval would be superfluous because states could pick and choose which occupational health and safety regulations to submit to the Administration.

The court then examined whether portions of Proposition 65 and the OEHHA Regs not included in the state plan related to the issue of the federal HCS. After justifying reasons for granting the Administration deference in interpreting the preemptive effects of its regulations, the court examined the agency's definition of issue as it pertained to the HCS. The Administration stated in implementing regulations of the HCS that the standard was intended to address comprehensively the "issue of evaluating the potential hazards of chemicals, and communicating information concerning hazards and appropriate protective measures to employees, and to preempt any legal requirements of a state...pertaining to this subject."<sup>n86</sup> Therefore, the Ninth Circuit concluded that Proposition 65 and the OEHHA Regs fell "squarely within the 'issue' of the [HCS]," because both were state laws that required "evaluating the potential hazards of chemicals and communicating information concerning hazards."<sup>n87</sup> The defendant tried to counter this argument by stating that because the HCS did not impose a regulatory burden on plaintiffs, the standard could not preempt state regulations not applying to the plaintiff. However, the court disagreed, concluding that because the Administration defined the issue of the HCS on the basis of the type of regulation involved, rather than who bore the regulatory burden, the agency had completely occupied the field of hazard evaluation and communication.

The Ninth Circuit supported its conclusion that the state laws in question were preempted by the federal HCS by examining implementing regulations for section 18 of OSHA, which state that "no state...may adopt or enforce...any requirement relating to the issue addressed by this Federal standard, except pursuant to a Federally-approved state plan."<sup>n88</sup> Therefore, federal standards such as the HCS preempted not only state standards directly covering the same issue, but also the broader category of state laws relating to the federal issue. Because the OEHHA Regs and HCS both directly governed occupational health and safety, they were related [\*608] to the same issue. Therefore, the court held that as applied to manufacturers and distributors of industrial trucks, California's Proposition 65 occupational warning requirements were preempted by OSHA and the HCS, except as contained within the California state plan.

### 3. *Sierra Club v. United States EPA*, 118 F.3d 1324 (9th Cir. 1997).

The Ninth Circuit held that the Environmental Protection Agency (EPA) had no authority to promulgate a final rule which allowed importation of polychlorinated biphenyls (PCBs) into the United States for purposes of disposal, because the rule violated the Toxic Substances Control Act (TSCA).<sup>n89</sup> The court also held that the Sierra Club was not required under Rule 15(c) of the Federal Rules of Appellate Procedure to serve notice under its petition for review on all of the commentators and witnesses of the informal rulemaking.

The court first examined the issue of notice under rule 15(c), which imposes upon a petitioner the obligation of serving "a copy [of the petition for review] on all parties who shall have been admitted to participate in the proceedings before the agency."<sup>n90</sup> In this case, more than three hundred groups, individuals, and organizations provided comments and input to EPA during the administrative rulemaking process. However, the court held that in an informal rulemaking, while any interested group or person may submit written or oral comments to the agency, no one is "admitted to participate in the proceedings,"<sup>n91</sup> and therefore no one becomes a party in a formal administrative adjudication through commenting. Concomitantly, the court granted the Sierra Club's motion to dispense with service of its petition on the individuals and groups who submitted their comments during the rulemaking.

The Ninth Circuit based its analysis of EPA's authority to promulgate the rule allowing importation of PCBs for disposal on the *Chevron*<sup>n92</sup> test. Under the rule in question, titled the "Import for Disposal Rule," EPA stated "it is no longer necessary for persons who wish to import PCBs for disposal in accordance with this rule to apply for case-by-case exemptions under [TSCA] 6(e)(3)."<sup>n93</sup> Instead, under EPA's rule importers must merely submit notice to EPA at least forty-five days prior to the date they intend to bring PCBs into the United States. If notice is provided in a [\*609] timely and complete manner once per year, a party may "continue importing indefinitely without interruption."<sup>n94</sup>

The court found that the statutory language of TSCA showed clear congressional intent regarding the regulation, treatment, and disposal of PCBs, and that this intent was contrary to EPA's rule. TSCA section 6(e)(3)(A)(i) categorically bans the manufacture of PCBs, stating that "no person may manufacture any polychlorinated biphenyl after two years from January 1, 1977." TSCA section 2 (7) defines the term "manufacture" to include "import[ing PCBs] into the customs territory of the United States." Under section 6 of the statute, EPA only has the authority to promulgate regulations that prescribe methods of PCB disposal which are consistent with

this ban.

There is only one exception to TSCA's broad ban on the manufacture and importation of PCBs. Section 6(e)(3)(B) allows the EPA administrator to grant an exemption if the following conditions are met: 1) she determines that "an unreasonable risk of injury to health or environment would not result", 2) the exemption does not last for more than one year, and 3) the party seeking the exemption makes a good faith effort to develop a substitute chemical. Therefore, the court held that EPA's rule allowing parties to "continue importing [PCBs] indefinitely without interruption" <sup>n95</sup> was contrary to Congress's clear intent, as expressed in the unambiguous language of the statute. Not only was the one year limit of the exception clearly disregarded, but the rule also impermissibly obviated the requirements that the administrator find that "an unreasonable risk of injury to health or environment would not result" and that the applicant made a good faith effort to develop a substitute chemical. Therefore, despite EPA's argument that it would be better able to protect the public from PCB contamination if it were allowed to import foreign PCB contaminants into the country, the court overturned the rule based on the first prong of the Chevron test. <sup>n96</sup>

## E. Torts

1. *In re the Exxon Valdez: Alaska Native Class v. Exxon Corp.*, 104 F.3d 1196 (9th Cir. 1997), *infra* Part III.

## F. Clean Water Act

1. *Ashoff v. City of Ukiah*, 130 F.3d 409 (9th Cir. 1997), *supra* Part I.B.

[\*610]

## II. Natural Resources

### A. Endangered Species Act

1. *American Rivers v. National Marine Fisheries Service*, 126 F.3d 1118 (9th Cir. 1997).

Various environmental and fishing groups alleged that federal agencies, namely the National Marine Fisheries Service (NMFS), the United States Army Corps of Engineers (Corps of Engineers), and the Bureau of Reclamation, violated the Endangered Species Act (ESA) <sup>n97</sup> by issuing a Biological Opinion in which the agencies claimed that barging endangered Snake River smolts would mitigate the adverse impacts of the hydroelectric operations. In this case, the Ninth Circuit dealt primarily with the procedural issues of mootness and notice, and did not reach the substantive merits of the claims.

In August 1994, numerous environmental and fishing groups filed suit against the Corps of Engineers, the Bureau of Reclamation, and NMFS alleging that the 1994-1998 Biological Opinion violated section 7(a)(2) of the ESA. <sup>n98</sup> Particularly, the groups alleged that the federal agencies violated the Act by issuing a Biological Opinion in which the agencies claimed that barging endangered Snake River smolts would mitigate the adverse impacts of the hydroelectric operations. The proceedings were stayed in order for the defendants to reinstate consultation on the biological opinion and to bring the biological opinion into compliance with another court order. <sup>n99</sup>

While the proceedings were stayed, NMFS issued a new biological opinion which superseded the 1994-1998 Biological Opinion. The 1995 Biological Opinion concluded that the hydroelectric system would jeopardize the continued existence of endangered salmon and their habitat, but that barge transportation was a reasonable and prudent alternative as a major means to mitigate the adverse impacts of the hydroelectric system. After issuing the biological opinion, the federal agencies moved for summary judgment on the ground that the plaintiffs' claims were moot.

The Oregon District Court held that the claims were not moot and granted defendants' motion for summary judgment, but the Ninth Circuit reversed. The Ninth Circuit based its reversal on its 1995 case, *Idaho Department of Fish & Game v. National Marine Fisheries Service (IDFG)*. <sup>n100</sup> In *IDFG*, the court held that the issuance of the 1995 Biological Opinion mooted a challenge to the 1993 Biological Opinion. Furthermore, the case did not fit within the "capable of repetition, yet evading review" [\*611] exception to the mootness doctrine because the 1995 Biological Opinion could still be challenged, and therefore would not evade review. There was still time to litigate the agency decisions made pursuant to that opinion.

In the present case, the new biological opinion superseded the 1994-1998 Biological Opinion, making any challenges to the latter moot. In addition, the plaintiffs' challenge to that opinion would not evade review because the biological opinion was valid for a period of three years. Therefore, the Ninth Circuit dismissed the challenge to the 1994-1998 Biological Opinion as moot.

The second issue the court addressed was the ESA's sixty-day notice provision. The ESA requires citizens to give the Secretary of the Interior and any alleged violators written notice of intent to sue sixty days prior to filing suit. <sup>n101</sup> Plaintiffs failed to provide such notice to the Corps of Engineers and the Bureau of Reclamation. As a result, the Ninth Circuit was forced to dismiss the claims

against those defendants.

The plaintiffs also failed to give notice to NMFS, an agency acting on authority derived from the Secretary of the Interior. However, in *Bennett v. Spear*,<sup>n102</sup> the United States Supreme Court held that challenges to the adequacy of biological opinions against the Secretary of the Interior, when acting in his capacity as administrator of the ESA, are to be pled under the Administrative Procedure Act (APA), rather than under the ESA citizen suit provision. The APA does not have a sixty-day notice requirement, and merely requires a final agency action. Here, the biological opinion was a jeopardy opinion which permitted the agency to "take" the endangered species under certain conditions. The Ninth Circuit held the opinion to be a final agency action. Accordingly, the Ninth Circuit held that claims against NMFS were properly pled.

2. *Marbled Murrelet v. Babbitt*, 111 F.3d 1447 (9th Cir. 1997), supra Part I.

3. *Natural Resources Defense Council v. United States Department of the Interior*, 113 F.3d 1121 (9th Cir. 1997).

The Ninth Circuit held that the U.S. Fish and Wildlife Service (FWS) must designate critical habitat for the coastal California gnatcatcher under the Endangered Species Act of 1973 (ESA).<sup>n103</sup> The FWS argued that listing of critical habitat would be imprudent because the identification of the habitat would increase the risk of deliberate habitat destruction. Also, because the majority of the habitat was not on federal land, the FWS argued that listing critical habitat would not be beneficial to the species. The court rejected these arguments, holding that when considering the risk of habitat destruction, the FWS must balance the risks of destruction with the benefits of designation. In making this determination, the FWS must [\*612] consider whether the designation is beneficial to the species overall, not just beneficial to the majority of its population.

In 1993, the FWS listed the gnatcatcher as a threatened species under the ESA. Section 4 of the ESA requires that when the FWS lists a threatened species, it must also designate critical habitat "to the maximum extent prudent and determinable."<sup>n104</sup> A coalition of environmental groups challenged the failure to designate critical habitat and appealed the district court decision denying the challenge.

The Fish and Wildlife regulations state that critical habitat designation would not be "prudent" under section 4 of the ESA when either of the following conditions applies: 1) the identification of critical habitat can be expected to increase risk to the species, or 2) designation of critical habitat would not be beneficial to the species.<sup>n105</sup> The FWS argued that designation of critical habitat would not be prudent because public identification would increase the risk of deliberate destruction of gnatcatcher habitat, and designation would not appreciably benefit the gnatcatcher because most of its habitat is on private land.

Although completion of a California tollroad mooted many of the claims in the original suit brought by the plaintiffs, the court found the issue of critical habitat designation for the gnatcatcher to be ripe for review. Under section 7 of the ESA, federal agencies must consult with the Secretary of Interior to ensure their actions do not harm critical habitat.<sup>n106</sup> Because the lack of critical habitat designation eliminates the section 7 consultation requirement, the court found that the issue was sufficiently concrete to consider ripeness.

To show that designation would actually increase the risk of habitat harm, the FWS pointed to eleven cases in which landowners or developers destroyed gnatcatcher sites after designation. Two of these incidents occurred after the FWS notified local authorities that gnatcatchers were present. Unconvinced, the court held that the FWS must balance the pros and cons of designation, and that the agency failed to show that designation would cause more destruction than protection of gnatcatcher sites.

The court also struck down the argument that critical habitat designation would not benefit the gnatcatcher because most of its habitat is on private land. The court pointed out that the regulation provides the Service the option of declining to designate critical habitat if it would not appreciably benefit the species, but that the FWS had incorrectly interpreted the statute as "benefits most of the species."<sup>n107</sup> Designation of critical habitat would be beneficial to gnatcatchers with habitat on federal land and private land affected by federal projects. In addition, the court held that the FWS's argument was inconsistent with the congressional intent that the imprudence exception be narrow.

[\*613] The FWS also argued that the California Natural Communities Conservation Program (NCCP) for protection of the gnatcatcher was a superior means of protection. The court chose not to consider this argument because the FWS did not identify this program in the final listing decision as a reason for not designating critical habitat. However, the court suggested that it would still reject the argument if it considered it. The court found the NCCP to be an inadequate substitute for critical habitat designation because designation triggers the ESA section 7 consultation requirement for federal agencies.

## B. Fish and Wildlife

1. *Alaska Wildlife Alliance v. Jensen*, 108 F.3d 1065 (9th Cir. 1997).

Two environmental groups, the Alaska Wildlife Alliance and American Wildlands, sued the Secretary of the Interior and the National Park Service (Park Service) to halt commercial fishing in Alaska's Glacier Bay National Park. The groups challenged the Park

Service's conclusion that commercial fishing is prohibited by statute in the wilderness areas of the park, but not in the nonwilderness areas. An association of commercial fishers intervened and challenged both the plaintiffs' standing and the Park Service's position that commercial fishing is prohibited in wilderness areas of the park. The Ninth Circuit affirmed the district court, holding that the plaintiffs had standing and that the Park Service was correct in its policy that commercial fishing was banned only in the wilderness areas of the park.

The court first discussed the plaintiffs' standing to bring this suit, using a three-part test for analyzing standing. An organization may bring an action on behalf of its members if the following requirements are established: 1) the individual members would have standing to sue, 2) the organization's purpose relates to the interests being vindicated, and 3) the claims asserted do not require the participation of individual members.<sup>n108</sup> The intervenors in the suit, the Allied Fishermen of Southeast Alaska (Fishermen) challenged only the first requirement of standing for the environmental plaintiffs. Individual members have standing to sue if they can show the following: 1) an actual or threatened injury that 2) is fairly traceable to the challenged action such that 3) it is likely to be redressed by a favorable decision.<sup>n109</sup>

The court found that the plaintiffs were injured because their members had diminished enjoyment of the park due to the noise and trash of the fishing vessels, as well as witnessing sea lions injured by trolling lures. The same facts offered sufficient proof that the injuries were traceable to commercial fishing. The court also indicated that elimination of commercial fishing would redress the plaintiffs' injuries. Finding that all elements of the test were satisfied, the court held that the plaintiffs had standing.

[\*614] The court also held that commercial fishing is prohibited in the wilderness areas of the park. The Alaska National Interest Lands Conservation Act (ANILCA),<sup>n110</sup> which governs Alaska's national parks, prohibits commercial enterprises in wilderness areas with a few limited exceptions. The Fishermen argued that two exemptions should allow commercial fishing. First, the Wilderness Act<sup>n111</sup> allows motorized vessels in wilderness areas where the use is established. The court found this provision limited only to the use of motorized vessels and inapplicable to the issue of commercial fishing. Second, the Fishermen pointed to a provision in ANILCA mandating the continuation of existing uses of temporary facilities on public lands where the taking of fish and wildlife is permitted.<sup>n112</sup> The court deferred to the Park Service's interpretation that this provision does not mean all existing uses of park resources must be allowed to continue.

The court then turned to the plaintiffs' challenge to commercial fishing in nonwilderness areas of the park. The majority found nothing in the statutes, legislative history, regulations, or case law expressly prohibiting commercial fishing in the nonwilderness areas of the park.

The Organic Act,<sup>n113</sup> which governs all national parks, prevents the Secretary of the Interior from acting contrary to the Act's purpose of conservation. The plaintiffs argued that allowing commercial fishing violates this statutory directive. The court found no evidence that commercial fishing is at odds with the long-term goal of conservation. It reasoned that the Wilderness Act, for example, has clear language prohibiting commercial activity, and if Congress intended to extend this ban to national parks, it would have done so when amending the Organic Act in 1970 and in 1978.

The court struck down several of the plaintiffs' arguments made under ANILCA. Because it found that the Organic Act does not prohibit commercial fishing, the court concluded the provision requiring ANILCA to be administered in accordance with the Organic Act added nothing to the argument.

Next, the court held that the provision of ANILCA that prevents restrictions on commercial fishing in certain parts of the park does not constitute an exception to an overall ban. The court interpreted this provision to imply that the Park Service may prohibit fishing elsewhere, but is not required to do so. The plaintiffs argued that such an interpretation made a section of ANILCA superfluous. Section 3202(c) of ANILCA bans the taking of fish and wildlife except that "fishing shall be permitted by the Secretary in accordance with the provisions of [ANILCA] and other applicable state and federal law."<sup>n114</sup> If the Act does not generally prohibit commercial fishing, the plaintiffs argued, then it is unnecessary for the Secretary to be able to allow it in certain situations. The court disagreed, finding the following two purposes in the section 3202(c) exception: 1) to exclude hunting from national parks, and 2) to allow for subsistence fishing otherwise prohibited in ANILCA.

The majority found congressional intent to allow commercial fishing in national parks. Beginning in 1936, agencies were allowed to publish regulations under the Federal Register Act,<sup>n115</sup> making statutory prohibitions unnecessary. Because Congress has never expressly prohibited commercial fishing in national parks, the majority found that it intended for the Secretary to regulate commercial fishing. The plaintiffs pointed to a 1978 amendment to the Organic Act as evidence that Congress wanted the Park Service to prohibit commercial fishing. The amendment prohibited the Secretary from authorizing activities "in derogation of the values and purposes" for which the parks were created.<sup>n116</sup> However, the court determined that the amendment was established during the expansion of the Redwood National Park and therefore was not aimed at fishing.

The court found nothing in the regulations indicating that the Park Service changed its position for the sake of this dispute. The plaintiffs pointed to a 1983 regulation prohibiting commercial fishing except "where specifically authorized by [federal] statutory law."<sup>n117</sup> The court interpreted this to be a regulatory ban on commercial fishing except where a statute deprives the agency of the

power to prohibit commercial fishing.

The court also found no regulation declaring that commercial fishing derogates park values and purposes. The plaintiffs argued that a proposed, but never adopted, regulation that would have phased out commercial fishing as a nonconforming use<sup>n118</sup> indicated the Park Service found commercial fishing to be a derogation of park values. The court pointed to the proposal language, which acknowledged that the Park Service would have to find commercial fishing to be a derogation of park values in order to phase it out. Because the proposal did not make a finding on that particular issue, the court concluded that the Park Service was not committed to that stance.

Finally, the court considered whether there was any case law prohibiting commercial fishing in national parks. The court found only cases that upheld the Secretary's authority to prohibit commercial fishing, but none that required the Secretary to prohibit it.

In a concurring opinion, Circuit Judge Schroeder agreed that no federal statutes prohibit an immediate ban on commercial fishing in the park, but disagreed that congressional intent endorsed agency discretion to permit commercial fishing in the park. The concurrence pointed to the committee report creating Glacier Bay National Park which contained a [\*616] statement of intent to create a nonconsumptive sanctuary for fish and wildlife.<sup>n119</sup>

2. *American Rivers v. National Marine Fisheries Service*, 126 F.3d 1118 (9th Cir. 1997), supra Part II.A.

3. *Marbled Murrelet v. Babbitt*, 111 F.3d 1447 (9th Cir. 1997), supra Part I.C.

4. *Northwest Environmental Defense Center v. Bonneville Power Administration*, 117 F.3d 1520 (9th Cir. 1997).

The Northwest Environmental Defense Center (NEDC) petitioned for review of agreements reached by Department of Energy (DOE), through Bonneville Power Administration (BPA), with Canada and several electric utilities governing rights to water stored behind hydroelectric dams on the Columbia River System in Canada. NEDC alleged that BPA ignored its duty under the Northwest Power Act (NPA)<sup>n120</sup> to provide equitable treatment for fish and wildlife in the river, and that the agency also violated the National Environmental Policy Act (NEPA)<sup>n121</sup> by failing to prepare an Environmental Impact Statement (EIS). The Ninth Circuit denied the petition.

The court first addressed NEDC's argument that once BPA gained control over 2.25 million acre-feet of water stored behind dams in Canada, it was required under the equitable treatment provision of the NPA to dedicate a portion of this water to benefit fish and wildlife. The court determined that NEDC had standing to raise claims under the NPA. Because fish were guaranteed a share of the water, denial of this benefit would injure fish and constitute an injury in fact to the plaintiffs. The equitable treatment mandate stems from the fact that one goal of the NPA is to "protect, mitigate, and enhance the fish and wildlife, including related spawning grounds and habitat, on the Columbia River and its tributaries."<sup>n122</sup> In furtherance of these goals, the Act charges the Administrator of BPA with the duty to exercise his responsibilities in a manner providing the same "equitable treatment" for fish and wildlife as she provides for other purposes of the hydroelectric facilities.

The court concluded that BPA was not required to dedicate a portion of the water for fish at the time it entered into the agreements. Because the vast majority of the water over which BPA acquired control was unallocated, it was premature to determine whether the agency had satisfied its equitable treatment obligation. Once BPA allocates water covered under the agreements, however, the agency is required to demonstrate that it has treated fish and wildlife equitably.

[\*617] The court emphasized that equitable treatment has both procedural and substantive components. Procedurally, BPA is required to take the Fish and Wildlife Program of the Pacific Northwest Electric Power and Conservation Planning Council (Council)<sup>n123</sup> into account to the "fullest extent possible."<sup>n124</sup> However, if the Council's program fails to ensure adequate fish survival, BPA has a substantive duty to take additional measures beyond those recommended by the Council. The court deferred to BPA's view that it must balance power needs with those of wildlife on a system-wide basis, but stated that the determination of equitable treatment is "highly fact-specific."<sup>n125</sup> Faced with the difficulty posed by the combination of these two requirements, the court encouraged BPA to develop a "mechanism" for fulfilling its obligation to facilitate meaningful review of decisions.

The Ninth Circuit reviewed BPA's decision not to prepare an EIS under an "arbitrary and capricious" standard. NEDC argued that BPA should have prepared an EIS because the decision to enter into the storage agreements was extremely controversial. BPA claimed to have addressed this concern by entering into a separate agreement, supported by some but not all commentators, promising that the storage agreement would not be operated in a manner harmful to fish and wildlife. Despite the fact that not all of the concerned commentators signed on to the fish and wildlife agreement, and the agreement was not addressed in the Environmental Assessment (EA), thereby denying the public an opportunity to review it, the court held that BPA's conclusion that the Fish and Wildlife agreement alleviated most of the concerns regarding the storage agreement was not arbitrary and capricious. In his dissent, Judge Reinhardt pointed out the apparent contradiction of this conclusion. He argued that if the Fish and Wildlife agreement required neither expert analysis nor public discussion because the document's "sole purpose was to placate the public ... and ... not ... to alleviate environmental injuries ... it is difficult to conclude that the Agreement quelled public controversy over the [water storage

agreements] - unless one also concludes that the public was totally manipulated and deceived." <sup>n126</sup>

NEDC also claimed that an EIS was required because of the following: 1) the failure of the EA to provide for an adequate analysis of cumulative impacts resulting from entering into the storage agreements, 2) BPA's 1988 decision to increase the Intertie capacity, and 3) the proposed expansion of the Bureau of Reclamation's Columbia Basin Project. However, the court held that BPA would consider such cumulative impacts in a future study known as the Columbia River Hydroelectric Operations System Op [\*618] eration Review, and that the proposed expansion of the Columbia Basin Project would not escape NEPA review, therefore "BPA made a reasoned evaluation of the relevant factors." <sup>n127</sup> In his dissent, Judge Reinhardt questioned the majority's conclusion that future compliance with NEPA could relieve BPA of its obligation to consider such cumulative impacts at the time it entered into the agreements.

In conclusion, the Ninth Circuit held that BPA did not violate the NPA or NEPA when it entered into the storage agreements. Consequently the court refused to either enjoin the agency from operating the hydrosystem under the agreements or require BPA to prepare an EIS.

5. *United States v. Bramble*, 103 F.3d 1475 (9th Cir. 1996), amended (Feb. 14, 1997), *infra* Part V.

6. *United States v. Hugs*, 109 F.3d 1375 (9th Cir. 1997), *infra* Part V.

### C. Forests

1. *Forest Guardians v. Dombeck*, 131 F.3d 1309 (9th Cir. 1997).

Environmental interest groups sued Dombeck, Chief of the U.S. Forest Service, seeking a declaratory judgment and injunctive relief for alleged violations by the Forest Service (FS) of the National Forest Management Act of 1976 (NFMA). <sup>n128</sup> The plaintiffs argued that the FS violated NFMA by implementing amendments to land and resource management plans (LRMPs) that would apply prospectively only, and therefore would not apply to projects already authorized but still being implemented. The district court granted the FS's motion for summary judgment, plaintiffs timely appealed, and the Ninth Circuit affirmed the district court's ruling.

NFMA, which guides the management of National Forest lands, directs the Secretary of Agriculture (Secretary) to develop LRMPs for units of the National Forest System in order to coordinate the multiple uses and harvest of various forest resources. <sup>n129</sup> In 1996, the FS amended the LRMPs for the Southwestern Region forests, providing new standards and guidelines for managing the Mexican spotted owl, northern goshawk, old growth, and grazing activities on national forest lands. Included in the new LRMPs were added restrictions on logging of old-growth forests and livestock grazing. In the Record of Decision for Amendment of Forest Plans (ROD) in the Southwestern forests, the FS specified that the 1996 Plan Amendments would apply only to "new permits, new contracts, and other new instruments for the use and occupancy of national forest lands" in the region. <sup>n130</sup> The Forest Guardians later filed a complaint for declaratory and injunctive relief against the FS in the Arizona District Court, alleging that the FS violated NFMA because the ROD stated that decisions [\*619] made prior to the 1996 Plan Amendments, many of which were still being implemented, were not required to conform to the new standards and guidelines. Plaintiffs sought to enjoin implementation of all forest management activities not consistent with the new amendments, and to enjoin all future authorizations for the use and occupancy of national forest lands not consistent with the new plan. The district court held that the FS's implementation of the 1996 Plan Amendments did not violate NFMA, and granted summary judgment for the FS. On appeal, the Forest Guardians again argued that the FS's decision to implement the 1996 Forest Plan Amendments prospectively but not retroactively violated NFMA. The Ninth Circuit disagreed, and affirmed the district court's grant of summary judgment in favor of the FS.

The Ninth Circuit focused on the Chevron analysis <sup>n131</sup> of an agency's interpretation of statutory provisions. The court concluded that Congress had clearly spoken on the issue in question, and therefore the court "must give force to its expressed intent" <sup>n132</sup> that the Secretary have discretion in amending existing forest plans and deciding how to implement amendments. In reaching that holding, the court examined section 1604(f)(4) of NFMA, which states that LRMPs developed in accordance with the act "shall be amended in any manner whatsoever after final adoption after public notice ...." <sup>n133</sup> In the court's view, this broad grant of authority included the ability to implement the 1996 Plan Amendments prospectively only. The Ninth Circuit buttressed its finding with the legal principle that "absent explicit legislative intent to the contrary, congressional enactments and administrative rules will not be construed to have retroactive effects unless their language requires this result." <sup>n134</sup> Because the language of section 1604(i) did not explicitly mandate the retroactive application of all amendments, and in fact expressly precludes retroactive applications of amendments where they would impair existing rights, <sup>n135</sup> which the court held would be the case here, applying the amendment retroactively would be inappropriate. Therefore, the court held that prior existing agreements were "grandfathered" into the new forest plans, leaving the new standards applicable only to future agreements, and making [\*620] the old standards applicable to prior agreements. Accordingly, the Ninth Circuit held that the FS's restriction of the 1996 Amendments to new authorization, contracts, and permits was permissible and affirmed the lower court's grant of summary judgment in favor of the FS.

2. *Marbled Murrelet v. Babbitt*, 111 F.3d 1447 (9th Cir. 1997), *supra* Part I.C.

3. Oregon Natural Resources Council v. Lowe, 109 F.3d 521 (9th Cir. 1997), supra Part I.C.

4. United States v. Gardner, 107 F.3d 1314 (9th Cir. 1997), infra Part V.

#### D. Hydroelectric Power

1. American Rivers v. National Marine Fisheries Service, 126 F.3d 1118 (9th Cir. 1997), supra Part II.A.

2. Association of Public Agency Customers v. Bonneville Power Administration, 126 F.3d 1158 (9th Cir. 1997), supra Part I.C.

3. Northwest Environmental Defense Center v. Bonneville Power Administration, 117 F.3d 1520 (9th Cir. 1997), supra Part II.B.

#### E. Water Quality

4. Ashoff v. City of Ukiah, 130 F.3d 409 (9th Cir. 1997), supra Part I.B.

5. United States v. Apex Oil Co., 132 F.3d 1287 (9th Cir. 1997).

The United States appealed a decision by the district court dismissing the first count of a five-count indictment for conspiring to discharge cargo-related oil residues. In a case of first impression, the Ninth Circuit held that the rule of lenity required dismissal of the charge. According to the Ninth Circuit, discharge of the material in question was not clearly forbidden by law.

On January 30, 1996, the grand jury indicted Apex Oil Company (Apex), its subsidiary Trinidad Corporation (Trinidad), as well as the individual manager of engineering, manager of operations, and four vessel captains. The five-count indictment charged that the defendants "did knowingly and willfully conspire and agree to discharge cargo-related oil residues in violation of Title 33, United States Code, Section 1908(a) and Title 33, Code of Federal Regulations, Section 151.10(c)." <sup>n136</sup> The four defendant captains piloted three ships that transported crude oil from Alaska to the West Coast of the Continental United States. The ships also transported grain to Africa, Asia, and Russia. Before grain could be transported, the ships had to be cleaned of oil residues. The cleaning process generated [\*621] a large amount of cargo-related oil residue (CROR) and waste material such as oily rags, plastic suits, flashlight batteries, and plastic scrapers. These residues and wastes were disposed of at sea. Over 550 fifty-five gallon drums were known to have been discharged.

The district court first denied that primary jurisdiction belonged to the Coast Guard and termed the discharges a public welfare offense. The district court held that the applicable regulations did not plainly include such muck, or oil constituents. Because of the ambiguity, and because other provisions regarding disposal of cleaning waste arguably did include such constituents, the district court held that the rule of lenity mandated dismissal of the charge contained in the first count of the indictment. The government moved for reconsideration, contending that there were factual issues as to the nature of the discharged materials. However, the district court denied the motion to reconsider, stating that the term "cargo-related oil residue" was unconstitutionally vague under the rule of lenity.

The 1980 Act to Prevent Pollution from Ships <sup>n137</sup> makes it a felony to knowingly violate the regulations promulgated by the Coast Guard. The regulation applicable to the case at hand states that "the cargo related oil residues of an oil tanker, including residues from cargo pump room bilges and all oil residues mixed with oil cargo residues shall not be discharged overboard." <sup>n138</sup> On appeal, the government relied on the definition of "oil" which included petroleum in any form. <sup>n139</sup> The government encouraged the Ninth Circuit to adopt a dictionary definition of the word "petroleum," which would have allowed for regulation of the discharged muck. The Ninth Circuit followed its earlier decision in *Cose v. Getty Oil Co.*, <sup>n140</sup> where it used the dictionary definition of petroleum. However, the court in *Cose* noted that crude oil tank bottoms would not be included in the definition of petroleum; crude oil tank bottoms are not subjected to various refining processes as required in order to meet the definition. Similarly, the muck in the case at hand was not refined petroleum. The Ninth Circuit did not label the government's interpretation incorrect, but noted that other interpretations of "petroleum" and "oil" were equally plausible. Such ambiguity showed a lack of fair notice to the defendant that the muck they discharged was "oil."

The government responded that the term "cargo-related oil residues" unambiguously included the muck in the case at hand. The Ninth Circuit, however, was not convinced, and held that the term "residue" also was ambiguous. The Ninth Circuit was unable to glean any guidance from the policy of the statute, namely to "prevent pollution of the ocean by oil without imposing too heavy a burden on oil transport by tanker," <sup>n141</sup> or from the legislative history. The Ninth Circuit found it incumbent upon the Coast Guard, the agency with expertise in the subject, to alleviate any ambiguity in the regulations. Because of the ambiguity, the Ninth Circuit invoked the rule of lenity in dismissing count one of the indictment.

### III. Native American Issues

1. Apache Survival Coalition v. United States, 118 F.3d 663 (9th Cir. 1997).

The Apache Survival Coalition (Coalition) appealed the district court's denial of a preliminary injunction against further construction of the Mount Graham International Observatory (observatory) on top of Mt. Graham in southeastern Arizona. The Coalition argued that the U.S. Forest Service (Forest Service) did not comply with the National Historic Preservation Act of 1966 (NHPA).<sup>n142</sup> The Ninth Circuit affirmed the denial of a preliminary injunction based on laches and the Coalition's failure to raise serious questions on the merits.

This case represents one in a series of challenges to the observatory project.<sup>n143</sup> In May of 1994 several environmental groups obtained a district court order enjoining construction of one telescope at a new location because it was not authorized by the Arizona-Idaho Conservation Act.<sup>n144</sup> The Coalition was not part of the court action resulting in the injunction. Instead of participating in the litigation, the Coalition chose to object to the Forest Service via fax. On April 26, 1996 Congress passed the "Kolbe Rider" to the Omnibus Consolidated Rescissions and Appropriations Act of 1996.<sup>n145</sup> Section 335 of the Act provided explicit approval for a new telescope to be built in the controversial Mt. Graham area. The district court subsequently dissolved its injunction. On June 17, 1996 the Coalition filed the case at hand asking for an injunction against further construction. The main argument of the Coalition was that the Forest Service violated the NHPA by failing to recognize that Mt. Graham in its entirety was sacred to practitioners of the traditional Western Apache religion, and the Forest Service considered only specific shrines while preparing its Environmental Impact Statement.

The Ninth Circuit considered two reasons for affirming the district court's denial of the injunction requested by the Coalition. First, the Ninth Circuit evaluated the defense of laches. To establish an adequate defense under the doctrine of laches, the defendant must show prejudice caused by the opposing party's lack of diligence in pursuing its claim. The Ninth Circuit held that the Coalition's failure to join the previous litigation effort aimed at enjoining the construction of the observatory illustrated that the [\*623] group lacked diligence. The Coalition chose to pursue administrative strategies to challenge the project. However, the efforts taken in the administrative challenge were held to be minimal, and therefore a finding of unreasonable delay was not precluded. Accordingly, the affirmative defense of laches was held applicable to bar the Coalition's request for an injunction.

The second reason the Ninth Circuit affirmed the denial of the Coalition's request for an injunction was that the Coalition failed to raise a serious question on the merits of the case. Specifically, the Coalition never explained how shifting the location of the telescope 1300 feet to its new location would cause a new injury. The challenge to the original location of the telescope failed in an earlier case,<sup>n146</sup> and the Coalition did not convince the Ninth Circuit that the new location of the telescope would cause any new or different harm than that alleged and rejected in the previous case. Therefore, the Ninth Circuit held the Coalition could not obtain an injunction, based on the doctrine of laches and the lack of a serious question on the merits.<sup>n147</sup>

## 2. Cabazon Band of Mission Indians v. Wilson, 124 F.3d 1050 (9th Cir. 1997), cert. denied, 118 S.Ct. 2319 (1998).

Four bands of Indians who operate simulcast wagering facilities on their tribal lands sued the Governor of California, the California Horse Racing Board, and the State of California (State), demanding that the defendants turn over to the bands the license fees that the State collects from California's horse racing associations based on revenue generated at the wagering facilities. Compacts between the bands and the State had left open the issues of licensing fees collected from racing associations until such time as a federal district court declared the fees illegal. The Ninth Circuit, recognizing that such fees had previously been held to be impermissible under the Indian Gaming Regulatory Act (IGRA),<sup>n148</sup> affirmed the district court's order that the State turn over the fees.

The litigation began with four Tribal-State compacts between the State and each band of Indians pursuant to IGRA. The compacts governed the bands' operation of simulcast wagering facilities and the State's collection of fees from these activities. The State agreed to pay the license fees collected from the racing associations to the bands if a federal district court declared the fees impermissible under the IGRA. Indeed, the Ninth Circuit had previously held that the collection of license fees was impermissible under IGRA because the bands had a "right" to the unpaid license fees.<sup>n149</sup>

[\*624] The State, however, refused to pay the fees, declared the compacts invalid, and threatened to cut off the simulcast signal unless the bands agreed to enter into negotiations for new compacts. The bands moved for an injunction to prevent the cessation of the signal. The State opposed enforcement by arguing the following: 1) the district court lacked subject matter jurisdiction to enforce the compacts, 2) the State was immune under the Eleventh Amendment, 3) the court decision holding the fees impermissible was so unexpected it invalidated the compacts; and 4) the bands breached the compacts by operating illegal gaming operations. The district court entered a preliminary injunction but ordered the bands to amend their complaints to seek relief for breach of the compacts under IGRA.

The complaints were amended and once again, the State countered with similar arguments but added that the compacts were invalid for the following two reasons: 1) the State never promised to pay license fees to the bands if the court determined those fees fell on the racing association rather than the bands, and 2) the bands were not the primary beneficiaries of revenue from simulcast wagering. The district court rejected these contentions and ordered the State to pay. The State appealed to the Ninth Circuit.

The Ninth Circuit evaluated the State's four arguments. First, the State had argued that it was immune from the bands' action to

enforce the obligations under the compacts. The Ninth Circuit held that the State had waived its immunity by consenting to suit in federal court. Specifically, the compacts stated that the bands "shall seek a declaratory judgment against the State from a United States District Court of competent jurisdiction as to whether the deduction and distribution of the state license fee...are permissible under the Act." <sup>n150</sup> This provision showed consent not only to the suit but also to the remedy. Furthermore, the compacts provided for judicial review of any action taken by either party under the compacts.

Next, the State argued that it never intended to surrender to the bands the license fees it collected from the racing industry. Instead, the State argued that based on extrinsic evidence, it agreed to pay license fees only if the court determined that these fees constituted a tax on the bands themselves. The Ninth Circuit rejected the extrinsic evidence and the State's argument as contrary to the plain and unambiguous language of the compacts. The language in the compacts broadly framed the question as to "whether the deductions and distributions of the state license fee under [California law] are permissible under the Act." <sup>n151</sup>

The State's third argument was that the bands were not the primary beneficiaries from class III gaming on tribal lands, and thus, the compacts were invalid. The Ninth Circuit held that the primary beneficiary analysis is only used to consider whether IGRA preempts the State's regulatory scheme as to the disputed license fees. In that context, IGRA does not preempt the State's scheme, even though others receive greater revenues [\*625] from the bands' simulcast wagering facilities than the bands receive. Furthermore, the Ninth Circuit held that the compacts were not invalidated by use of the primary beneficiary analysis.

The State's final argument was that the bands were conducting illegal gambling not authorized by a Tribal-State compact. However, the court held that the State had no jurisdiction over gaming activities that are not the subject of a Tribal-State compact. IGRA limits the State's regulatory authority to that expressly agreed upon in a compact. Outside such provisions, the enforcement remains the exclusive province of the federal government. Therefore, the bands had not breached the compacts, and the State had no jurisdiction to enjoin those gaming activities.

In conclusion, the Ninth Circuit held the State to the agreement in the compacts. Both the State and the bands expressly agreed that a federal district court would resolve the question of whether license fees were permissible under IGRA. Because a court had indeed resolved this issue, the Ninth Circuit affirmed the district court's order that the State pay the bands all fees, past and present, that were collected from California's horse racing associations based on revenue generated by wagering facilities.

### 3. In re the Exxon Valdez: Alaska Native Class v. Exxon Corp., 104 F.3d 1196 (9th Cir. 1997).

A group of Alaska Natives filed a class action against Exxon Corporation (Exxon) as a result of the 1989 grounding of the Exxon Valdez in Prince William Sound, Alaska. The Alaska Natives sued for loss of a subsistence way of life. The District Court for the District of Alaska entered summary judgment in favor of Exxon. The Ninth Circuit affirmed, stating that the Alaska Natives' claim for noneconomic damage failed to prove a "special injury" as required in order to bring a private suit for a public nuisance.

In 1989, the Exxon Valdez ran aground in Prince William Sound, Alaska causing a massive oil spill. Alaska Natives initiated a class action against Exxon Corporation. Included in the class were Alaska Natives and Native organizations such as individual Native villages, incorporated and unincorporated Native entities and associations, and tribal entities. Eventually all Native villages and governmental entities were excluded from the class definition, limiting it to 3455 individual Alaska Natives. The class claimed that as a result of the oil spill, its subsistence way of life was damaged. <sup>n152</sup> The complaint also averred damage to archaeological sites and artifacts, natural resources, and property, all of which were part of the plaintiffs' natural habitat and lives. After claims for loss of fish harvest were settled, the only claims remaining were those involving noneconomic [\*626] damage. Exxon subsequently moved for summary judgment on the noneconomic claims.

The Alaska Natives class claimed that noneconomic damages were recoverable under general maritime law, the Alaska Environmental Conservation Act, <sup>n153</sup> and the common law of Alaska. The class essentially stated a public nuisance claim for noneconomic damage under federal maritime law. In granting Exxon's motion for summary judgment, the district court relied on the "special injury rule" as defined through common law and the Restatement (Second) of Torts. <sup>n154</sup> According to the special injury rule, a private party can bring suit for a public nuisance only if she can show a special injury different in kind, not just in magnitude, than that suffered by the general public. In affirming Exxon's motion for summary judgment, the Ninth Circuit held that the noneconomic injury suffered by the class was not different in kind than that suffered by the general public and therefore the special injury rule was not satisfied.

The Ninth Circuit acknowledged that the oil spill affected the communal life of the Alaska Natives. However, it held that although the injury suffered by the class might be different in magnitude, it was not different in kind than that suffered by other Alaskans. In reaching this conclusion, the court reasoned that the Alaska Constitution does not limit the right to a subsistence lifestyle to Alaska Natives. <sup>n155</sup> Accordingly, the Ninth Circuit held that the class failed to show any special injury sufficient to support a claim for public nuisance, and therefore affirmed the district court's grant of summary judgment in Exxon's favor.

### 4. Masayesva ex rel. Hopi Indian Tribe v. Hale, 118 F.3d 1371 (9th Cir. 1997).

The Ninth Circuit heard three appeals involving the long-running dispute between the Navajo Nation and Hopi Tribe over the

ownership, control, and use of 1.8 million acres of Native American reservation land in northeastern Arizona and the neighboring portions of Utah and New Mexico. These cases arose out of remedial provisions of the Navajo-Hopi Settlement Act of 1974,<sup>n156</sup> which allowed partition of reservation land that the courts had declared jointly owned by both tribes, but which had been used exclusively by the Navajo. The Navajo overgrazed the land, at least in part because the Department of the Interior had a policy of refusing Hopi grazing permits while simultaneously granting Navajo permits for more grazing than the land could support. Congress hoped to resolve this inequity, and the Settlement Act specifically authorized litigation between the Hopi and Navajo for enumerated damages. The Settlement Act mandated partition of the disputed reservation land, a 1.8 million acre plot known as the Joint Use Area (JUA). The first of the three Settlement Act cases before the Ninth Circuit involved a judgment entered in favor of the Hopi for the [\*627] fair value of the grazing and agricultural use of the JUA between 1962, when the JUA was established by court order, and 1979, when the land was partitioned. The second appeal is known as the "owelty case," and involved an action for the difference in value between the land awarded to the Hopi Tribe and the land awarded to the Navajo Nation. The third appeal arose out of an action by the Hopi against the Navajo and the United States to recover damages to the JUA caused prior to partition.

In the first case on appeal, the district court awarded the Hopi \$ 18,187,132 for the Navajo's grazing and agricultural use of the Hopi's one-half interest in the JUA from 1962 to 1979. The Navajo appealed, contending that the Settlement Act was unconstitutional because it divested the Navajo of a vested property right to use the entire JUA for grazing. The Navajo also argued that the district court lacked jurisdiction because determination of the fair value of grazing and agricultural use of the JUA constituted a nonjusticiable political question. The Ninth Circuit affirmed the judgment of the district court, concluding that the Navajo never had, either by contractual promise or court decree, a right to use the JUA to the exclusion of the Hopi. The Navajo argued that they had been given such a right by the court in *Healing v. Jones*,<sup>n157</sup> a case in which an Arizona district court found that the Navajo had no right to use the land until 1931, when the Secretary of the Interior impliedly exercised his authority under an 1882 executive order to "settle" the Navajo.<sup>n158</sup> However, the Ninth Circuit found that the *Healing* decision granted the Hopi and Navajo joint and undivided interests in the JUA, and that the Settlement Act was a legitimate effort by Congress to implement the *Healing* decision. As to the argument that the court lacked jurisdiction to determine fair value of grazing and agricultural use because it was a nonjusticiable political question, the Ninth Circuit found that calculating "fair value" was within the expertise of the judiciary.

The Navajo also challenged several evidentiary rulings and factual findings regarding the valuation of their grazing and agricultural use of the JUA. The Navajo challenged the district court's decision to admit the testimony of two of the Hopi's expert witnesses concerning the fair value of grazing and growing corn on the JUA. The Hopi's grazing expert, Dr. Workman, was an economist. The Navajo argued that Dr. Workman lacked foundation to support his testimony because he was not a real estate appraiser, and that his methodology did not meet the test for expert scientific testimony in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>n159</sup> The Ninth Circuit held that Dr. Workman's twenty-five years as a professor of Range Economics and his numerous peer-reviewed publications on subjects related to his testimony qualified him as an expert witness, and therefore the district court did not abuse its discretion in allowing his testimony. The Ninth Circuit also held that the Navajo's *Daubert* argument was misplaced because Dr. Workman's testimony was based on a straight [\*628] forward application of range economics, rather than a novel scientific theory.

The Navajo also challenged the decision to admit testimony from Robert Francy, the Hopi's expert appraiser who discussed the value of corn grown on the JUA. Francy's opinion was based on what others had told him about corn prices, and the Navajo argued that this was inadmissible hearsay. The Ninth Circuit held that the Navajo had failed to timely object to Mr. Francy's opinion and therefore had waived their right to assign error on appeal. Furthermore, the Ninth Circuit held that the third party statements provided Mr. Francy with background information from which he formed his own conclusions, and that this kind of reliance is a regular practice of appraisers and not improper.

The Navajo had two challenges to the district court's valuation of the agricultural use. First, they argued that the court erred in adopting Mr. Francy's conclusion that the Navajo had actually farmed the JUA from 1962 to 1979, because Mr. Francy's conclusion was based on speculation. The Ninth Circuit held that because the record showed that the conclusion was based on Bureau of Indian Affairs reports, aerial photographs, maps, documents, and personal spot checks, the district court did not clearly err. The Navajo also argued that there was insufficient evidence to support the conclusion that there was a commercial market for the corn grown by the Navajo on the JUA. The evidence showed that most of the corn was consumed by the Navajo themselves, but the Ninth Circuit concluded that this personal consumption supported the finding that a market existed for the corn.

The Navajo made three challenges to the district court's valuation of grazing on the JUA. First, they contended that the value of their grazing should have been calculated in the manner that ranch land is typically valued: based on the land's carrying capacity (the amount of grazing the land can sustain without irreparable damage). The Navajo grazing practice had exceeded the carrying capacity of the land by as much as seven times. Because of this overgrazing, the land's carrying capacity was drastically reduced, and therefore the land's rental value was only one-fifth the typical rate in Arizona. Instead of relying on carrying capacity, the district court valued the land according to estimates of the actual amount of grazing done by Navajo animals on the JUA. The Ninth Circuit concluded that consumption beyond the carrying capacity should exact a premium charge and that the district court did not err in so charging the Navajo for their overgrazing. The Navajo also argued that the court overestimated the number of animals grazed on the JUA, but the Ninth Circuit held that the district court's estimates of the number of animals were not clearly erroneous. Finally, the Navajo contended that the district court should have valued grazing by using federal land lease rates, rather than adjusted private Arizona lease rates. The Ninth Circuit concluded that because there were no federal lease rates for the first decade of the use, and federal lease rates reflect policy decisions and not market realities, the district court did not err in using private rates.

[\*629] The second appeal before the Ninth Circuit was called the owelty case. When land is unequally divided in a partition, one former joint tenant pays a sum of money to another to compensate her for receiving the lesser value. This sum is the owelty. In the owelty case, the district court determined that there was no difference in value between the Navajo half of the land and the Hopi half, so it did not order an owelty award. The Settlement Act authorized the district court to award damages for any difference in value between the halves of the land with improvements and grazing capacity fully restored. The Hopi appealed, arguing the district court undervalued the Navajo land by misinterpreting the owelty statute. The Navajo cross-appealed, arguing that the Hopi should have been judicially estopped from seeking owelty, adding that the Hopi got the better land and should give the Navajo an owelty payment. The Ninth Circuit held that the district court erred in its interpretation of the Settlement Act and remanded for a new calculation of the amount of owelty due the Hopi. The court affirmed the district court's denial of owelty to the Navajo, and concluded that the Hopi were not judicially estopped from seeking owelty and were entitled to prejudgment interest on the payment.

The Ninth Circuit first addressed the Hopi's argument that the district court misinterpreted the language of the Settlement Act directing that the value of the partitioned land "shall be not less than its value with improvements and its grazing capacity fully restored." <sup>n160</sup> The district court determined the value of the land with its grazing capacity fully restored and with only the improvements that were necessary to restore the grazing potential, such as roads, stream diversions, irrigation canals, and fences. The Hopi argued on appeal that the district court misconstrued the statute and should have valued all improvements, including schools, hospitals, churches, hogans, trading posts, and other buildings that contribute to the value of the land as an Indian reservation with potential for grazing, agriculture, residential use, and commercial enterprise. The Navajo contended that the land should be valued strictly as a cattle ranch and that most of the buildings were worthless.

The Ninth Circuit first examined the legislative history of the Settlement Act to determine which valuation method was correct. Because the legislative history referred to improvements without indicating what type of improvements Congress indicated, the court turned to the language of the statute itself. Congress did not qualify the word "improvements," so the Ninth Circuit found that the statute did not expressly limit the type of improvements to be considered in valuing the land. After reaching this conclusion, the Ninth Circuit then examined the Hopi argument that the value of the partition should include all structures that contribute to the value of the land as an Indian reservation. Because the structures were owned either privately or by the United States and were not partitioned to either party, the court rejected the Hopi argument. Instead, the Ninth Circuit followed the Hopi's alternative theory and held that while the value of the improvements should not be calculated, the district court should have [\*630] calculated the land's enhanced value due to the presence of the improvements. The court remanded on this issue, instructing the district court to make findings of fact regarding the contributing value of the schools, hospitals, churches, and other structures to the value of the JUA.

The Navajo cross-appealed for an owelty payment from the Hopi based on testimony at trial of an expert who believed that the Hopi land fully restored would support more grazing than the Navajo land fully restored. The district court had noted that the same expert had admitted to a ten to fifteen percent margin of error in his estimates of grazing capacity. Based on this margin of error, the Ninth Circuit concluded that the district court correctly found that any difference between the value of the Hopi and Navajo lands was not statistically relevant. In addition, the court held that the Hopi were entitled to prejudgment interest, affirming its decision in *Hopi Tribe v. Navajo Tribe* <sup>n161</sup> that the Settlement Act provision permitting the Navajo and Hopi to sue one another in federal court allowed for recovery of such interest.

The third and final appeal before the Ninth Circuit involved the Hopi's suit against the Navajo and the United States for damages to Hopi land caused by Navajo overgrazing prior to the 1979 partition. The district court concluded the Hopi could recover the postpartition difference in value "between the land 'as is' and the land fully restored." <sup>n162</sup> None of the parties contested this ruling. However, both the Hopi and Navajo challenged the district court's calculation of damages and its decision to absolve the United States of liability on the grounds that the government had made reasonable efforts to protect the range. The Ninth Circuit found that the challenges to the district court's calculations lacked merit, except for the Hopi argument that the district court wrongly denied damages for lost grazing opportunity on lands that the Hopi had set aside for wildlife.

The Ninth Circuit then affirmed the district court's determination that the United States was not liable for the overgrazing of the JUA. The district court applied a reasonable person standard, and while the Ninth Circuit held that a reasonable trustee standard would have been more appropriate, it did not reverse because the Hopi had not argued that the district court measured the government's fault by the wrong standard. The Ninth Circuit concluded that the government was not strictly liable.

In his dissenting opinion, Judge Fletcher argued that the district court should have applied a reasonable trustee standard in measuring the government's action or inaction, and that the government had not taken reasonable steps to prevent overgrazing by the Navajo. Judge Fletcher asserted that a reasonable trustee must do more than a reasonable person to prevent destruction to property, and the Ninth Circuit should have acknowledged this important distinction. The judge recommended remanding to the district court to properly apply the heightened reasonableness standard.

[\*631]

5. *Montana v. Gilham*, 133 F.3d 1133 (9th Cir. 1998).

The Ninth Circuit held that a state's sovereign immunity under the Eleventh Amendment bars an unconsented tort action filed by an individual in tribal court. Montana has such immunity and did not waive it in its state constitution.

In 1986, Christine Gilham was fatally injured when the automobile in which she was a passenger struck a permanently anchored highway sign. The accident occurred on the Blackfeet Indian Reservation, located within the State of Montana. Toni Gilham, the victim's mother, brought suit in the Blackfoot tribal court against the state of Montana and the driver of the car, who was intoxicated at the time of the accident. The claims against Montana alleged that the state was negligent in its design, construction, and maintenance of the intersection where the accident occurred.

Montana filed a motion to dismiss for lack of jurisdiction due to Montana's immunity from suit as a sovereign under the Eleventh Amendment. The tribal court denied the motion, and at trial the state of Montana and the driver were found jointly and severally liable for approximately \$ 160,000. Montana appealed unsuccessfully to the Blackfeet Court of Appeals and the Blackfeet Supreme Court. Montana next filed for declaratory relief in the U.S. District Court, which granted summary judgment to Montana. Gilham appealed to the Ninth Circuit.

The Ninth Circuit analyzed the sovereign immunity issue in two steps. The court first addressed the question of whether Montana had sovereign immunity from suit in a tribal court. Next it determined whether Montana had waived immunity in its state constitution.

Although the Eleventh Amendment prohibits unconsented suits against a state in federal court, the express terms do not extend to tribal court.<sup>n163</sup> The Eleventh Amendment specifically waives sovereign immunity as to Article III courts, but tribal courts are not Article III courts. Therefore, the court held the Eleventh Amendment inapplicable to suits brought in tribal court.

The Ninth Circuit next examined the sovereign powers retained by both the state of Montana and the Blackfeet tribe. The court noted that upon entering the union, states were required to surrender immunity from suits brought by other states, but did not surrender their immunity from tribal, foreign, or federal courts. The tribes retained all sovereignty possessed as original inhabitants of the continent, unless this sovereignty was removed by Congress or proved to be inconsistent with an overriding federal interest.

The court also examined whether the tribes traditionally had the power to bring a state into its court. In *Oliphant v. Suquamish Indian Tribe*,<sup>n164</sup> the U.S. Supreme Court held that Indian tribes did not have criminal jurisdiction over non-Indians, because such authority was not part of their retained, inherent sovereignty. Therefore, the Court concluded that states retained their immunity from suits by individuals and tribes did not hold the power that abrogates that immunity.

The Ninth Circuit also examined the present case in the context of *Nevada v. Hall*.<sup>n165</sup> In *Hall*, the Supreme Court held that Nevada's sovereign immunity did not protect the state from a suit in California state court brought by a California resident injured in an automobile accident caused by an employee of the state of Nevada. The Supreme Court held there were no constitutional limits on the power of a state to allow its courts to have jurisdiction over another state.

The Ninth Circuit held that *Hall* did not apply to tribal courts, and even if it did, it would be inapplicable to Gilham's suit. *Hall* is limited to cases where the exercise of sovereign jurisdiction does not threaten the constitutional system of cooperative federalism. However, Gilham's suit attempting to hold Montana liable for highway design decisions involved governmental processes, and therefore fell outside the scope of *Hall*.

The tribal court also held that Montana was immune from suit in Blackfeet tribal court, but found that Montana had waived that immunity in its constitution. However, the Ninth Circuit held that this waiver applied only to Montana's own courts. Although the Montana Constitution declared that Montana waived immunity, it was not clear in which courts the waiver applied. The Ninth Circuit interpreted the waiver narrowly, and held that it applied only to Montana state courts, not to tribal or federal courts.

#### 6. *United States v. Houser*, 130 F.3d 867 (9th Cir. 1997).

A non-Indian convicted of second-degree murder of an Indian on an Indian reservation challenged his conviction based on alleged criminal procedure violations of the federal district court. He also brought a post-*Lopez* challenge to congressional power under the Indian commerce clause to legislate against crimes by non-Indians in Indian territory. The Ninth Circuit upheld the conviction, rejecting the criminal procedure challenges and holding that Congress's power to legislate against crimes by non-Indians in Indian territory was valid under the Indian commerce clause. The court held that the Indian commerce clause was very different from the interstate commerce clause at issue in *Lopez*.

Donald Houser, a non-Indian, shot and killed an Indian woman with whom he had previously been romantically involved. Houser claimed that when the victim attempted to take the gun away from him, it accidentally fired. Houser was convicted by a jury of second degree murder in the U.S. District Court of Idaho.

Houser challenged his conviction on the following four grounds: 1) the district court erred in instructing the jury that it could infer malicious aforethought from his use of a deadly weapon; 2) the district court erred [\*633] in instructing the jury that it could convict Houser if it found that he had killed "with extreme disregard for human life"; 3) the district court erred by failing to instruct

the jury that it must find Houser acted "willfully" to convict; and 4) Congress lacked the power under the Indian Commerce Clause to proscribe crimes by non-Indians. <sup>n166</sup>

The court first addressed the issue of the jury instruction which allowed an inference of malice aforethought based on the use of a deadly weapon. Although the Ninth Circuit had previously overturned a conviction based on a jury instruction allowing such permissive inference, in this situation the Ninth Circuit felt that other instructions offset any damage, and there was no indication that the district court judge indicated a preference for a particular verdict.

Houser next challenged the jury instruction allowing a finding of malice aforethought if the jury concluded that Houser killed recklessly and with extreme disregard for human life. Houser contended that "extreme disregard" should apply only to acts endangering the populace at large, not for acts aimed at an individual. However, the Ninth Circuit pointed to other cases where extreme disregard was held to apply to reckless acts toward a solitary victim.

Houser's third challenge involved the district court's failure to instruct the jury that it must find his act "willful" in order to convict him of second-degree murder. The Ninth Circuit held that the "malice aforethought" mental state requirement for a second-degree murder conviction could be inferred from a reckless act with extreme disregard for human life, and therefore no separate finding of willfulness was required. Because the court previously held that such an inference was acceptable, it held the jury instructions were valid.

Houser was tried for murder in federal court under 18 U.S.C. 1152, which extends general criminal law of the United States to Indian country. Section 1152 is commonly employed when a non-Indian commits a crime against an Indian. Houser argued that Congress did not have the authority under the Indian commerce clause of the U.S. Constitution to legislate against crimes by non-Indians. Houser pointed to *United States v. Lopez*, <sup>n167</sup> which held that Congress did not have the authority under the commerce clause to regulate firearms near schools. The Ninth Circuit ruled that the federal interstate commerce clause and the Indian commerce clause are very different in their history and scope. While the interstate commerce clause is concerned with maintaining free trade among the States, the Indian Commerce Clause gives Congress plenary power to legislate the affairs of Indians. The Ninth Circuit held that this power extended to the punishment of crimes by non-Indians against Indians.

[\*634]

7. *United States v. Hugs*, 109 F.3d 1375 (9th Cir. 1997), *infra* Part V.

8. *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997).

A member of the Blackfeet Indian Tribe brought this action in the District of Montana for recognition and registration of a judgment entered in tribal court as a result of a personal injury action against a nonmember. The district court for the District of Montana granted summary judgment in favor of the member. On appeal, the Ninth Circuit held that principles of comity, not full faith and credit, were determinative of whether the district court should recognize and enforce the tribal judgment. The Ninth Circuit also held that the tribal court did not have jurisdiction over the action that arose from a collision occurring on a United States highway within the reservation. Accordingly, the tribal judgment was not entitled to recognition in the United States district court.

On July 17, 1989, Thomas Marchington collided with Blackfeet Indian Tribe member Mary Jane Wilson while trying to pass her as she began a left turn. Wilson sued Marchington and the tribal jury awarded her \$ 246,100. The Blackfeet Supreme Court eventually upheld the award. Wilson then brought suit in the United States District Court for the District of Montana to register the tribal court judgment. The district court granted summary judgment in favor of Wilson.

The Ninth Circuit began its analysis by noting that by its terms, the Full Faith and Credit Clause of the United States Constitution applies only to the states, <sup>n168</sup> and therefore does not afford full faith and credit to Indian tribal judgments. The full faith and credit statute also does not reference Indian tribes. <sup>n169</sup> The Ninth Circuit did note that the authorities are split on whether or not Indian tribes were to be considered as "territories." However, the court was influenced by subsequent statutes that expressly extended full faith and credit to certain tribal proceedings. In the view of the court, such measures would not be necessary if Congress had intended Indian tribes to come within the purview of the full faith and credit statute. Had Congress wanted the statute to include Indian tribes, it could easily have done so through specific reference.

Because full faith and credit was inapplicable in this case, the recognition and enforcement of tribal judgments in federal court was dependent on the principles of comity. The Ninth Circuit analyzed the traditional rules for comity and special considerations arising out of existing Indian law and formulated a general rule. According to the Ninth Circuit, federal courts should recognize and enforce tribal judgments. However, tribal judgments can neither be recognized nor enforced if either of the follow [\*635] ing applies: 1) the tribal court did not have both personal and subject matter jurisdiction; or 2) the defendant was not afforded due process of the law. Furthermore, a federal court may exercise discretion and choose not to recognize or enforce a tribal judgment based on equitable grounds including the following: 1) fraud; 2) conflicts with another final judgment entitled to recognition; or 3) public policy of the United States or the forum state in which recognition is sought. The subject matter jurisdiction factor is a threshold inquiry to virtually every federal examination of a tribal judgment. The existence of both subject matter jurisdiction and personal jurisdiction is a

necessary predicate for federal court recognition and enforcement of a tribal judgment. Due process was another factor the Ninth Circuit was not willing to ignore. In addition, the Ninth Circuit held that the tribal court proceedings must afford the defendant due process or the judgment would not be recognized by the United States.

The Ninth Circuit also dismissed any requirement of reciprocal recognition as a prerequisite to United States recognition. According to the court, such requirements involve policy consideration and are more properly left to the executive and legislative branches. The Ninth Circuit also emphasized the need to apply federal common law when a federal rule or decision is necessary to protect a uniquely federal interest. Indian law was viewed as uniquely federal in nature. Accordingly, the court held that the "quintessentially federal character of Native American law, coupled with the imperative of consistency in federal recognition of tribal court judgments, by necessity require that the ultimate decision governing the recognition and enforcement of a tribal judgment by the United States be founded on federal law." <sup>n170</sup>

Applying the comity analysis to the case at hand, the court held that the tribal judgment was not entitled to recognition or enforcement because the tribe lacked subject matter jurisdiction. The Supreme Court has held that "tribal courts may not entertain claims against nonmembers arising out of accidents on state highways, absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers on the highway in question." <sup>n171</sup> The Ninth Circuit found *Strate v. A-1 Contractors* to be controlling in the present case because of similarities between the facts in the two cases. The district court found that the accident occurred on the highway, and the Ninth Circuit found no clear error based on supporting facts in the record. Because the principles of comity require that a tribal court have competent jurisdiction before its judgment will be recognized by United States courts, and in this case the tribe lacked subject matter jurisdiction, the Ninth Circuit reversed the lower court and remanded with instructions to enter judgment in favor of the nonmember, Marchington.

[\*636]

#### IV. Litigation Issues

##### A. Civil Procedure

1. *Masayesva ex rel. Hopi Indian Tribe v. Hale*, 118 F.3d 1371 (9th Cir. 1997), supra Part III.
2. *Sierra Club v. United States EPA*, 118 F.3d 1324 (9th Cir. 1997), supra Part I.D.

##### B. Standing

1. *Alaska Wildlife Alliance v. Jensen*, 108 F.3d 1065 (9th Cir. 1997), supra Part II.B.
2. *Coupar v. United States Department of Labor*, 105 F.3d 1263 (9th Cir. 1997), supra Part I.A.

#### V. Constitutional Challenges

1. *American Rivers v. National Marine Fisheries Service*, 126 F.3d 1118 (9th Cir. 1997), supra Part II.A.
2. *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050 (9th Cir. 1997), cert. denied, 118 S.Ct. 2319 (1998), supra Part III.
3. *Masayesva ex rel. Hopi Indian Tribe v. Hale*, 118 F.3d 1371 (9th Cir. 1997), supra Part III.
4. *Montana v. Gilham*, 133 F.3d 1133 (9th Cir. 1998), supra Part III.
5. *United States v. Bramble*, 103 F.3d 1475 (9th Cir. 1996), amended (Feb. 14, 1997).

Ronald Bramble appealed a series of felony and misdemeanor convictions, including possession of eagle feathers and migratory birds. In its first chance to uphold a federal wildlife protection law since the Supreme Court limited Congress's Commerce Clause authority in *United States v. Lopez*, <sup>n172</sup> the Ninth Circuit upheld the Eagle Protection Act <sup>n173</sup> as a valid exercise of Commerce Clause power. The court reasoned that Congress had a rational basis for the conclusion that extinction of the eagle would have a substantial effect on interstate commerce, and therefore upheld the validity of the Eagle Protection Act. The court also upheld the Migratory Bird Treaty Act <sup>n174</sup> under the Necessary and Proper Clause and treaty-making power of the Constitution.

Bramble offered to sell sea otter pelts to undercover federal agents. He also showed the agents parts of a bald eagle, golden eagle, red-tailed hawk, and great horned owl. Bramble's pelts turned out to be river otter pelts, which are legal to sell, but he was charged and convicted of a felony for possession of eagle feathers as well as a misdemeanor for possession [\*637] of migratory birds. He also was convicted of felonies for illegal possession of firearms and possession and cultivation of marijuana.

Bramble was unsuccessful in the procedural challenges to his criminal convictions. The court found the police search of his home to be legal. Bramble contested the fact that when he directly asked the agents if they were police officers, they said they were not. However, a direct denial of the identity of an undercover agent is a permissible misrepresentation to obtain consent to entry. Bramble also challenged the warrantless entry of uniformed police officers who entered after the federal agents called for backup. The court held that consent extended to undercover agents who establish probable cause for a search also extends to backup officers summoned by the undercover agents. The court also held Bramble's consent to a search of his home was voluntary, and found at his suppression hearing that Bramble was not deprived of rights.

Relying on *Lopez*, Bramble challenged the constitutionality of each statute under which he was convicted, arguing that they went beyond the power of Congress to regulate interstate commerce. The Ninth Circuit pointed to cases it had decided post-*Lopez* (under the Controlled Substances Act and the felon in possession of a firearm statute) to support the district court convictions.

The district court upheld the Migratory Bird Treaty Act under the Commerce Clause, in part due to a 1920 Supreme Court ruling, *Missouri v. Holland*.<sup>n175</sup> The Ninth Circuit found that the district court misspoke when it stated that the Supreme Court upheld the Migratory Bird Treaty Act under the Commerce Clause. It pointed out that the Act was validated under the Necessary and Proper Clause of Article I, Section 8 of the U.S. Constitution, as well as the Article II treaty-making power.<sup>n176</sup> The Supreme Court found the treaty and the statute necessary to protect migratory birds from extinction. As a result, the Ninth Circuit found it unnecessary to consider whether the Migratory Bird Treaty Act was a valid exercise of the Commerce Clause.

Finally, the Ninth Circuit considered whether the Eagle Protection Act was a valid exercise of the Commerce Clause power of the Constitution. Noting that the Supreme Court as well as the Ninth Circuit have upheld the Act under the Commerce Clause prior to the *Lopez* ruling, the court reaffirmed the constitutionality of the Act.

In *Lopez*, the Supreme Court held that Congress did not have the authority under the Commerce Clause to regulate firearms near schools. The Court defined broad classes of activities that Congress has the authority to regulate under the Commerce Clause, including "activities having a substantial relation to interstate commerce."<sup>n177</sup> The Court found the proper test for this class to be whether the activity "substantially affects" interstate commerce.<sup>n178</sup>

[\*638] Bramble argued that the Act has nothing to do with any economic enterprise that substantially affects commerce. The court disagreed, holding that extinction of the eagle would substantially affect interstate commerce by making several types of commercial activities impossible. These activities include future commerce in eagles or their parts, interstate travel for viewing or studying eagles, and commerce in products derived from eagles or from study of their genetic material. The court pointed out that the only two courts to confront post-*Lopez* challenges to federal wildlife protection laws reached the same conclusion.<sup>n179</sup>

Expanding on its examples of affected future commerce, the court indicated that protection of an endangered species may lead to a significant enough regeneration of the species to allow for economic exploitation of that species in the future. It also pointed out that if the species goes extinct, its genetic pool is lost, taking unknown commercial possibilities with it. Therefore, the court concluded that Congress had a rational basis in determining that the extinction of the eagle would have a substantial effect on interstate commerce.

#### 6. *United States v. Gardner*, 107 F.3d 1314 (9th Cir. 1997).

In 1988 the Forest Service issued Clifford and Bertha Gardner a ten-year permit allowing the Gardners to graze their cattle on portions of the Humboldt National Forest. In 1992 a fire burned over 2000 acres of land in the national forest. The Forest Service and Nevada Department of Wildlife reseeded much of the burned area and informed the Gardners that the area would be closed to grazing for two years. The Gardners complied with the Forest Service instructions for one year and then resumed grazing on the burned area in 1994. The Forest Service advised the Gardners that they were violating the terms and conditions of their grazing permit and instructed them to remove the cattle from the burned areas. When the Gardners refused, the Forest Service revoked their permit.

The federal government then sued for injunctive relief to halt unauthorized grazing by the Gardner's livestock on U.S. Forest Service lands in Nevada. The Gardners argued that Nevada was the rightful owner of these public lands, not the federal government. The district court granted the United States' motion for summary judgment and enjoined the Gardners from further unauthorized grazing. The Gardners appealed. The Ninth Circuit held that the federal government was authorized to retain public lands for its own purposes, and was not required to hold land acquired from Mexico in 1848 for the establishment of future states. The Ninth Circuit also found that the Equal Footing Doctrine did not operate to give Nevada title to the public lands within its boundaries, and that federal ownership of public lands did not encroach upon the core powers reserved for the states under the Tenth Amendment.

The Gardners argued that when the United States received the land in question from Mexico in the Treaty of Guadalupe Hidalgo in 1848, the gov [\*639] ernment had a duty to hold that land in trust for the creation of future states and was not authorized to retain the land for its own use. The Gardners argued that when Nevada became a state, all public lands within its boundaries reverted to the state. The Gardners based their argument on *Pollard's Lessee v. Hagan*,<sup>n180</sup> an 1845 case that dealt with land the United States acquired from the thirteen original states. Virginia and Georgia ceded land to the United States to discharge debt incurred during the

Revolutionary War, and the Supreme Court determined that this land was held in trust for the establishment of future states. The Ninth Circuit distinguished the Gardners' case from Pollard's Lessee. While the original thirteen colonies had independent claims to sovereignty preceding statehood, Nevada had no such claim. Because the federal government was the initial owner of the land that later became Nevada, the Ninth Circuit concluded that the reasoning of Pollard's Lessee did not apply.

The Ninth Circuit held that because the United States has held title to the unappropriated lands in Nevada since Mexico ceded the land in 1948, the land belongs to the United States. Therefore, the Property Clause of the United States Constitution applied to the land.<sup>n181</sup> The Property Clause provides that Congress has the power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."<sup>n182</sup> Because the Supreme Court has repeatedly construed the Property Clause as an expansive and limitless power, the Ninth Circuit held that the United States had the power to administer federal lands in Nevada any way it chose, and therefore had the ability to establish a national forest system.

The Ninth Circuit then addressed the Gardners' argument under the Equal Footing Doctrine, which requires that upon admission to the Union, a new state possess the same powers of sovereignty and jurisdiction as did the original thirteen states. The Gardners argued that Nevada was not on equal footing because the federal government owns over eighty percent of the land in the state, and that the state must have title and eminent domain of all lands within its boundaries in order to satisfy the Equal Footing Doctrine. In Pollard's Lessee, the Supreme Court discussed the meaning of the Equal Footing Doctrine and held that the shores of and land beneath navigable waters were reserved to the states, and were not granted to the federal government by the Constitution.<sup>n183</sup> The Ninth Circuit concluded that because the Supreme Court has not extended the Equal Footing Doctrine to "fast dry land,"<sup>n184</sup> the federal lands in question were not reserved for the state of Nevada.

Additionally, the Ninth Circuit noted that the purpose of the Equal Footing Doctrine was to establish equality among the states with regards to sovereignty and political standing. The mere fact that some states have [\*640] federal lands within their boundaries while others do not, and that this disparity may cause economic differences between the states, does not mean such diversity in any way limits a state's political rights and sovereignty. Because the Equal Footing Doctrine applies only to sovereignty and political rights, and because it attaches primarily to lands beneath navigable waters, the Ninth Circuit rejected the Gardner's argument that the doctrine should operate to give Nevada title to the public lands within its boundaries.

The Ninth Circuit then turned to the Gardners' challenge of Nevada's "Disclaimer Clause."<sup>n185</sup> This provision of the Nevada Statehood Act of 1864 promised that Nevada would disclaim all rights to the unappropriated public lands lying within its boundaries, and that such land would remain at the sole disposition of the United States.<sup>n186</sup> The Gardners argued that Nevada could not give the United States title to public lands through the disclaimer clause because such clauses are declaratory and confer no new right or power upon the United States. The Ninth Circuit agreed that the disclaimer clause was declaratory but found that this was irrelevant because the United States already had title to the lands through the Treaty of Guadalupe Hidalgo. The disclaimer clause was not a grant of title from Nevada to the United States, but a recognition of the federal government's preexisting title.

Finally, the Ninth Circuit addressed the Gardners' Tenth Amendment claim that federal ownership of public lands in Nevada invades the core powers reserved to the state of Nevada, such as police powers. The court referred to *Kleppe v. New Mexico*,<sup>n187</sup> where the Supreme Court concluded that a state retains civil and criminal jurisdiction over federal lands within its boundaries so long as it exercises its power in a manner that does not conflict with federal law.<sup>n188</sup> The Ninth Circuit concluded that the state of Nevada was not being unconstitutionally deprived of the ability to police the lands within its borders and could exercise jurisdiction over federal lands so long as its exercise of power did not conflict with federal law.

7. *United States v. Houser*, 130 F.3d 867 (9th Cir. 1997), *supra* Part III.

8. *United States v. Hugs*, 109 F.3d 1375 (9th Cir. 1997).

Defendants Frank and William Hugs were convicted of violating the Bald and Golden Eagle Protection Act (BGEPA).<sup>n189</sup> On appeal to the Ninth Circuit, the defendants claimed the BGEPA violated their First Amendment right to free exercise of religion. They also argued that improper jury instructions and illegal actions by an undercover agent were grounds for reversing the conviction. The Ninth Circuit upheld the constitutionality of the BGEPA under the Religious Freedom Restoration Act of 1993 [\*641] (RFRA)<sup>n190</sup> and, after finding no validity in the defendants' other claims, upheld their convictions.

A Montana state game warden posed as a semiretired contractor interested in hunting, fishing, and purchasing trophy big game heads. The defendants invited the warden to pay a fee and join them in a game hunt on the Crow Reservation. While hunting, the defendants shot at, and sometimes hit, golden and bald eagles. The warden learned that the Hugs were actively involved in purchasing and selling eagles and eagle parts, and subsequently gave the defendants artifacts made from eagle parts in return for cash and promised services. He concluded his investigation by searching the defendants' home. The search revealed eagle feathers in war bonnets, a freshly killed golden eagle, and a videotape depicting William Hugs shooting and killing eagles caught in leg hold traps. The defendants were subsequently tried and convicted under the BGEPA.

The defendants freely admitted that they trapped, shot at, and killed eagles, but argued that they were seeking eagle feathers and

parts for their own religious use, and therefore the BGEPA infringed on the First Amendment guarantee of free exercise of religion. Additionally, the defendants claimed that they were unduly prejudiced because the jury was not given an instruction regarding the above defense, and also because the case was not dismissed due to illegal actions conducted by the government during the undercover investigation. In particular, the defendants referred to the actions by undercover warden Long who personally shot at and killed several animals during the course of the undercover investigation.

The BGEPA provides a general prohibition on the taking, possessing, purchasing, or selling of bald eagles, golden eagles, or their parts.<sup>n191</sup> Contrary to the defendants argument that the Act interferes with freedom of religion, enrolled Native Americans can obtain eagles or eagle parts for documented religious use through a permit process administered by the U.S. Fish and Wildlife Service.<sup>n192</sup> The defendants, however, claimed that their right to free exercise of religion was effectively denied by the difficulty of obtaining administrative approval to take eagles or eagle parts. They asserted that up to two years may be required to obtain a permit to take, possess, or transport certain types of eagle parts.

A defendant who is prosecuted under the BGEPA for purely commercial, rather than religious, activities may not assert a claim that his free exercise of religion has been infringed. However, because the district court found that the Hugs' activities may have been for religious purposes, the Ninth Circuit allowed the defendants to raise the free exercise of religion defense. However, the Ninth Circuit limited the defendants' challenge to the facial validity of BGEPA, and therefore the manner in which the act was administered was not at issue. Administrative challenges were precluded in this case because the defendants never applied for a permit. The facial analysis of the BGEPA was guided by RFRA.

[\*642] According to RFRA, the government is forbidden from substantially burdening the free exercise of religion unless the burden being imposed is in pursuit of a compelling governmental interest and is done in the least restrictive means possible.<sup>n193</sup> As to the first element, the Ninth Circuit held that there was a compelling governmental interest in protecting eagles due to their religious significance to Native Americans and their status as threatened or endangered species. The defendants did not deny the existence of the compelling governmental interest. As to the second element, the Ninth Circuit was equally satisfied that the BGEPA and permit system effectuate the governmental interest in the least restrictive manner possible. The permit system allows for takings of eagles for religious purposes and only requires the minimum amount of information necessary to ensure that eagles and eagle parts will be used for legitimate religious purposes.

The Ninth Circuit also rejected the defendants' allegation of improper jury instructions. The jury was offered instructions that essentially stated it was illegal for Native Americans to kill, sell, or purchase eagles, eagle feathers, or eagle parts without a permit. The Ninth Circuit affirmed that the BGEPA contains no exceptions for religious uses without a permit. Any instructions to the contrary would assume the BGEPA was unconstitutional. While unconstitutionality may have been the defendants' theory for the case, it presented an issue of law for the judge and not the jury.

The Ninth Circuit was similarly unwilling to reverse the convictions based on the alleged illegal activities of the game warden because 1) the agent killed game out of season in order to maintain his credibility as a supposed hunter, 2) only shot animals from relatively abundant species, and 3) did not shoot any eagles. Although questions were raised regarding the extent to which crimes may be committed by undercover agents in an attempt to prevent similar crimes by others, the Ninth Circuit held that an agent's conduct must be so outrageous that it would violate due process for the government to seek a conviction. Additionally, the Ninth Circuit relied on precedent that there is no outrageous government conduct defense when a defendant's illegal activity is ongoing.<sup>n194</sup> Accordingly, after confirming that the actions of the defendants constituted a "sale" within the meaning of the BGEPA, the Ninth Circuit affirmed the defendants' convictions.

9. *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), *supra* Part III.

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Environmental Law  
Hazardous Wastes & Toxic Substances  
CERCLA & Superfund  
General Overview  
Environmental Law  
Hazardous Wastes & Toxic Substances  
Resource Conservation & Recovery Act  
General Overview  
Labor & Employment Law  
Employment Relationships  
At-Will Employment  
Employees

#### FOOTNOTES:

n1. Clean Air Act of 1970 (CAA), 42 U.S.C. 7401-7671 (1994).

n2. Toxic Substances Control Act (TSCA), 15 U.S.C. 2601-2692 (1994).

n3. TSCA, 15 U.S.C. 2622(a) (1994); CAA, 42 U.S.C. 7622(a) (1994).

n4. *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under the two-step analytical approach adopted in *Chevron*, the first step is to determine whether Congress has directly spoken to the precise question at issue. *Id.* at 842. The court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. *Id.* at 842-43. However, if the statute is silent or ambiguous with respect to the specific issue, the analysis moves to step two, and the question for the court is whether the agency's interpretation is based on a permissible construction of the statute. *Id.* at 843.

n5. 993 F.2d 1387, 1393 (9th Cir. 1993) (en banc), cert. denied, 510 U.S. 946 (1993).

n6. 29 U.S.C. 201-219 (1994).

n7. *Coupar*, 105 F.3d at 1266.

n8. Clean Air Act of 1970, 42 U.S.C. 7401-7671 (1994).

n9. 898 F.2d 687 (9th Cir. 1990), cert. denied, 498 U.S. 998 (1990).

n10. The "law of the case doctrine" precludes one panel of an appellate court from reconsidering questions that another panel has decided on a prior appeal in the same case. *Kimball v. Callahan*, 590 F.2d 768, 771 (9th Cir. 1979).

n11. 42 U.S.C. 6901-6992k (1994).

n12. 33 U.S.C. 1251-1387 (1994).

n13. *Ashoff v. City of Ukiah*, 130 F.3d 409, 410 (9th Cir. 1997).

n14. 42 U.S.C. 6972(a)(1)(A) (1994).

n15. For instance, federal regulations require that landfill owners or operators must cover disposed solid waste with six inches of earthen material at the end of each day, but in an approved state, the state can establish an alternative cover if the owner can demonstrate that it functions as well as the six inches of earthen material. 40 C.F.R. 258.21(a)-(b) (1997).

n16. 42 U.S.C. 7401-7671 (1994).

n17. In *Northwest Environmental Advocates v. City of Portland*, the Ninth Circuit acknowledged that citizens have standing under the CWA to enforce permit conditions based on both EPA-promulgated effluent limitations and state-established standards. 56 F.3d 979, 988 (9th Cir. 1995).

n18. 33 U.S.C. 1311(b)(1)(C) (1994).

n19. *Id.* 1365(a)(1).

n20. *Id.* 1365(f)(6).

n21. 42 U.S.C. 7604(a)(1) (1994).

n22. *Id.* 7604(f)(4).

n23. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601-9675 (1994).

n24. 909 F.2d 1260 (9th Cir. 1997).

n25. *United States v. Kimbell Foods*, 440 U.S. 715 (1979); *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994); *Atherton v. FDIC*, 519 U.S. 213 (1997).

n26. 42 U.S.C. 9601-9675 (1994).

n27. *Id.* 9613(g)(1)(B).

n28. *Duensing v. Travelers' Co.*, 849 P.2d 203, 206-07 (9th Cir. 1993).

n29. For example, the court noted that the insurer's interpretation could be used to deny product liability claims (where a bottle was manufactured with impure glass) or negligence claims (where spoiled food was served in a restaurant).

n30. 42 U.S.C. 9601-9675 (1994).

n31. See H.R. Rep. No. 99-253 pt. 3, at 18-19 (1985), reprinted in 1986 U.S.C.A.N. 3038, 3041; S. Rep. No. 99-11, at 43 (1985); *United Tech. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96 (1st Cir. 1994) (citing to the extensive legislative history).

n32. See, e.g., *Key Tronic Corp. v. United States*, 511 U.S. 809, 814-15 (1994); *United Tech. Corp.*, 33 F.3d at 100; *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1457 n.3 (9th Cir. 1986).

n33. See *Key Tronic Corp.*, 511 U.S. at 818 n.11; *United Tech. Corp.*, 33 F.3d at 99 n.8, 100; *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1120 (3d Cir. 1997); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996); *United States v. Colorado & E. R.R. Co.*, 50 F.3d 1530, 1536 (10th Cir. 1995); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672-73 (5th Cir. 1989).

n34. See *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1995) and *Colorado & E.R.R.*, 50 F.3d 1534, 1534-36 (10th Cir. 1995) (rejecting a working PRP's attempt to hold another PRP liable who had settled with the government by arguing that section 113(f)(2) did not apply because their claim was for "cost recovery" under section 107, not for "contribution" under section 113(f)).

n35. In footnote 4, however, the court conceded that in equitably allocating responsibility, courts can consider the fact that a PRP has itself engaged in cleanup efforts.

n36. 951 F.2d 246 (9th Cir. 1991).

n37. 49 U.S.C. 301-353 (1994).

n38. Federal-Aid Highway Act of 1966, 23 U.S.C. 101-158 (1994).

n39. National Environmental Policy Act of 1969, 42 U.S.C. 4321-4370d (1994).

n40. 49 U.S.C. 303(c) (1994).

n41. 722 F.2d 1423, 1428 (9th Cir. 1983).

n42. 740 F.2d 1442 (9th Cir. 1984).

n43. 401 U.S. 402, 411-13 (1971) (holding that an agency must show that the avoidance alternatives pose an unusual situation, truly unusual factors, or represent cost or community disruption reaching extraordinary magnitudes).

n44. 42 U.S.C. 13,201-13,556 (1994).

n45. Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. 839-839h (1994); the Pacific Northwest Federal Transmission System Act of 1974 (Transmission Act), 16 U.S.C. 838-838k (1994); the Pacific Northwest Consumer Power Preference Act of 1964 (Preference Act), 16 U.S.C. 837-837h (1994); and the Bonneville Project Act of 1937 (Project Act), 16 U.S.C. 832-832m (1994).

n46. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

n47. 16 U.S.C. 838d (1994).

n48. *Id.* 791a-828c.

n49. *Id.* 824k(i)(1)(ii).

n50. *Id.* 832a(b).

n51. See *Hancock v. Train*, 426 U.S. 167, 179 (1976) (quoting *Mayo v. United States*, 319 U.S. 441, 448 (1943), "where Congress does not affirmatively declare its instrumentalities or property subject to regulation, the federal function must be free of regulation").

n52. National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(E) (1994).

n53. See *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1229 (9th Cir. 1988) (holding that "the consideration of alternatives requirement is both independent of, and broader than, the EIS requirement").

n54. 16 U.S.C. 838d (1994).

n55. *Id.* 839e(a)(1).

n56. *Id.* 839e(i).

n57. *Id.*

n58. 831 F.2d 1467, 1471 (9th Cir. 1987).

n59. See, e.g., *Atlantic Richfield Co. v. Bonneville Power Admin.*, 818 F.2d 701, 705 (9th Cir. 1987) (a fixed customer charge unrelated to actual energy usage was a "rate for the sale or disposition of power").

n60. 16 U.S.C. 839f(e)(5) (1994).

n61. Cal. Bus. & Prof. Code 5200-5499 (West 1990 & Supp. 1994).

n62. Cal. Code Regs. tit. 4, 2511 (1997).

n63. 637 F.2d 685, 687-88 (9th Cir. 1981).

n64. 42 U.S.C. 4321-4347 (1994).

n65. 47 F.3d 212, 216 (7th Cir. 1995).

n66. 16 U.S.C. 1531-1544 (1994).

n67. 42 U.S.C. 4321-4370d (1994).

n68. *Ramsey v. Kantor*, 96 F.3d 434, 444 (9th Cir. 1996).

n69. 83 F.3d 1068, 1074 (9th Cir. 1996).

n70. National Forest Management Act of 1976, 16 U.S.C. 1600-1614 (1994).

n71. National Environmental Policy Act of 1969, 42 U.S.C. 4321-4370d (1994).

n72. 16 U.S.C. 1604(g) (1994); 36 C.F.R. 219 (1997).

n73. 42 U.S.C. 4332(2)(C) (1994). The standard provides that a reviewing court shall set aside agency actions, findings, or conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.*

n74. 5 U.S.C. 706(2)(A) (1994).

n75. Pacific Northwest Regional Forester's Draft Interim Goshawk Management Direction.

n76. Marble Mountain Audubon Soc'y v. Rice, 914 F.2d 179, 182 (9th Cir. 1990).

n77. 42 U.S.C. 4321-4370d (1994).

n78. 29 C.F.R. 1910.1200 (1997).

n79. 29 U.S.C. 651-678 (1994).

n80. Cal. Health & Safety Code 25249.5-25249.13 (West 1998).

n81. Cal. Code Regs. tit. 22, 12000-12100 (1996).

n82. Cal. Code Regs. tit. 8, 5194(b)(6) (1996).

n83. *Id.* 5194(b)(6)(A).

n84. 505 U.S. 88 (1992).

n85. *Id.* at 102 (emphasis in original).

n86. 29 C.F.R. 1910.1200(a)(2) (1997).

n87. *Industrial Truck Ass'n v. Henry*, 125 F.3d 1305, 1312 (9th Cir. 1997) (citing 29 C.F.R. 1910.1200(a)(2) (1997)).

n88. 29 C.F.R. 1910.1200(a)(2) (1997).

n89. 15 U.S.C. 2601-2618 (1994 & Supp. 1996).

n90. Fed. R. App. P. 15(c).

n91. *Sierra Club v. United States EPA*, 118 F.3d 1324, 1326 (9th Cir. 1997).

n92. *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under the two-step analytical approach adopted in *Chevron*, the first step is to determine whether Congress has directly spoken to the precise question at issue. *Id.* at 842. The court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. *Id.* at 842-43. However, if the statute is silent or ambiguous with respect to the specific issue, the analysis moves to step two of the analysis, and the question for the court is whether the agency's interpretation is based on a permissible construction of the statute. *Id.* at 843.

n93. *Disposal of Polychlorinated Biphenyls; Import for Disposal*, 61 Fed. Reg. 11,096, 11,097 (Mar. 18, 1996) (now codified at 40 C.F.R. 761.93).

n94. *Id.* at 11,101.

n95. *Id.*

n96. *Chevron*, 467 U.S. at 842-43.

n97. *Endangered Species Act of 1973*, 16 U.S.C. 1531-1543 (1994).

n98. *Id.* 1536(a)(2).

n99. *Idaho Dep't of Fish & Game v. National Marine Fisheries Serv. (IDFG)*, 850 F. Supp. 886, 900 (D. Or. 1994), vacated as moot, 56 F.3d 1071 (9th Cir.

1995). The District Court of Oregon held that the 1993 Biological Opinion was arbitrary and capricious. Because errors in the 1993 Biological Opinion were carried over into the 1994-1998 Biological Opinion, the federal agencies reinitiated consultation on the new opinion.

n100. IDFG, 56 F.3d at 1071.

n101. 16 U.S.C. 1540(g)(2)(A)(i) (1994).

n102. 520 U.S. 154 (1997).

n103. Endangered Species Act of 1973, 16 U.S.C. 1531-1544 (1994).

n104. 16 U.S.C. 1533(3) (1994).

n105. 50 C.F.R. 424.12(a)(1)(i)-(ii) (1997).

n106. 16 U.S.C. 1536(2) (1994).

n107. Natural Resources Defense Council v. United States Dep't of the Interior, 113 F.3d 1121, 1125 (9th Cir. 1997).

n108. Fund for Animals v. Lujan, 962 F.2d 1391, 1396 (9th Cir. 1992).

n109. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

n110. 16 U.S.C. 3101-3233 (1994).

n111. 16 U.S.C. 1131-1136 (1994).

n112. 16 U.S.C. 3204(a) (1994).

n113. 16 U.S.C. 1-4 (1994).

n114. 16 U.S.C. 3202(c)(2) (1994).

n115. Federal Register Act, ch. 417, 49 Stat. 500 (1935) (codified as amended at 16 U.S.C. 1501-1511 (1994)).

n116. 16 U.S.C. 1a-1 (1994).

n117. General Regulations for Areas Administered by the National Park Service, 48 Fed. Reg. 30,252, 30,283 (June 30, 1983).

n118. Glacier Bay National Park, Alaska; Fishing Regulations, 56 Fed. Reg. 37,262, 37,263 (Aug. 5, 1991).

n119. S. Rep. No. 96-413, at 137 (1980), reprinted in 1980 U.S.C.C.A.N. 5070, 5081.

n120. Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act), 16 U.S.C. 839-839h (1994).

n121. National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321-4370d (1994).

n122. 16 U.S.C. 839b(h)(1)(A) (1994).

n123. The Council is an interstate compact created by the Northwest Power Act which is directed to create "a program to protect, mitigate, and enhance" the Columbia River Basin's fish and wildlife "affected by the development and operation of the Basin's hydropower system." 16 U.S.C. 839b(h)(2)(A) (1994).

n124. Northwest Env'tl. Defense Ctr. v. Bonneville Power Admin., 117 F.3d 1520, 1532 (9th Cir. 1997).

n125. *Id.* at 1534.

n126. *Id.* at 1541-42.

n127. *Id.* at 1538 (citing *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992)).

n128. 16 U.S.C. 1600-1614 (1994).

n129. 16 U.S.C. 1604(a) (1994).

n130. *Forest Guardians v. Dombeck*, 131 F.3d 1309, 1311 (9th Cir. 1997).

n131. *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under the two-step analytical approach adopted in *Chevron*, the first step is to determine whether Congress has directly spoken to the precise question at issue. *Id.* at 842. The court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. *Id.* at 842-43. However, if the statute is silent or ambiguous with respect to the specific issue, the analysis moves to step two of the analysis, and the question for the court is whether the agency's interpretation is based on a permissible construction of the statute. *Id.* at 843.

n132. *Forest Guardians*, 131 F.3d at 1312.

n133. 16 U.S.C. 1604(f)(4) (1994).

n134. *Forest Guardians*, 131 F.3d at 1313 (quoting *Chenault v. United States Postal Serv.*, 37 F.3d 535, 537 (9th Cir. 1994)).

n135. NFMA states that "any revision in present or future permits, contracts, and other instruments...shall be subject to valid existing rights." 16 U.S.C. 1604 (i) (1994). The legislative history of this provision indicates that it was intended to clarify that the government is not taking any private rights or other interests when amending LRMPs. S. Rep. No. 94-893, at 47-48 (1976), reprinted in 1976 U.S.C.C.A.N. 6662, 6706.

n136. *United States v. Apex Oil Co.*, 132 F.3d 1287, 1288 (9th Cir. 1997). The indictment was for violations of the 1980 Act to Prevent Pollution from Ships, 33 U.S.C. 1901-1915 (1994), and its implementing regulations. *Id.*

n137. 33 U.S.C. 1908(a) (1994).

n138. 33 C.F.R. 151.10(c) (1997).

n139. *Id.* at 151.05.

n140. 4 F.3d 700 (9th Cir. 1993).

n141. *United States v. Apex Oil Co.*, 132 F.3d 1287, 1291 (9th Cir. 1997).

n142. 16 U.S.C. 470-470mm (1994).

n143. See *Mount Graham Red Squirrel v. Yeutter*, 930 F.2d 703 (9th Cir. 1991) (*Red Squirrel I*); *Mount Graham Red Squirrel v. Madigan*, 954 F.2d 1441 (9th Cir. 1992) (*Red Squirrel II*); *Mount Graham Red Squirrel v. Espy*, 986 F.2d 1568 (9th Cir. 1993) (*Red Squirrel III*); *Apache Survival Coalition v. United States*, 21 F.3d 895 (9th Cir. 1994) (*Apache Survival I*); *Mount Graham Coalition v. Thomas*, 53 F.3d 970 (9th Cir. 1995) (*Mt. Graham I*); *Mount Graham Coalition v. Thomas*, 89 F.3d 554 (9th Cir. 1996) (*Mt. Graham II*).

n144. Pub. L. No. 100-696, 102 Stat. 4597-4599 (1988).

n145. Pub. L. No. 104-134, 110 Stat. 1321 (1996).

n146. *Apache Survival I*, 21 F.3d at 895.

n147. However, the court did counsel the Coalition that nothing in the present opinion should discourage it from seeking the inclusion of Mt. Graham in the National Register of Historic Places, thereby avoiding many of the problems the Coalition sought to redress.

n148. *Indian Gaming Regulatory Act of 1988*, 25 U.S.C. 2701-2721 (1994).

n149. *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430 (9th Cir. 1994).

n150. *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1054 (9th Cir. 1997).

n151. *Id.* at 1057.

n152. The Ninth Circuit defined the "subsistence way of life" allegedly damaged by the oil spill as "dependent upon the preservation of uncontaminated natural resources, marine life and wildlife, and reflects a personal, economic[,] psychological, social, cultural, communal and religious form of daily living." *In re the Exxon Valdez*, 104 F.3d 1196, 1197 (9th Cir. 1997).

n153. Alaska Stat. 46.03.822 (Michie 1996).

n154. Restatement (Second) of Torts 821C(1) cmt. b (1989).

n155. Alaska Const. art. VIII, 3, 15, 17.

n156. Navajo-Hopi Settlement Act of 1974, 25 U.S.C. 640d to 640d-28 (1994).

n157. 210 F. Supp. 125 (D. Ariz. 1962).

n158. *Id.* at 157.

n159. 509 U.S. 579 (1993).

n160. 25 U.S.C. 640d-5(d) (1994).

n161. 46 F.3d 908 (9th Cir. 1995).

n162. *Masayesva*, 118 F.3d at 1382.

n163. The Eleventh Amendment provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." U.S. Const. amend. XI.

n164. 435 U.S. 191 (1978).

n165. 440 U.S. 410 (1979).

n166. *United States v. Houser*, 130 F.3d 867, 868 (9th Cir. 1997).

n167. 514 U.S. 549 (1995).

n168. " Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." U.S. Const. art. IV, 1.

n169. " Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." 28 U.S.C. 1738 (1994).

n170. *Wilson v. Marchington*, 127 F.3d 805, 813 (9th Cir. 1997).

n171. *Strate v. A-1 Contractors*, 520 U.S. 438, 440 (1997).

n172. 514 U.S. 549 (1995).

n173. Bald and Golden Eagle Protection Act, 16 U.S.C. 668-668d (1994).

n174. 16 U.S.C. 703-712 (1994).

n175. 252 U.S. 416 (1920).

n176. *Id.* at 432.

n177. *Lopez*, 514 U.S. at 558-59.

n178. *Id.* at 559.

n179. *United States v. Lundquist*, 932 F. Supp. 1237 (D. Or. 1996); *United States v. Romano*, 929 F. Supp. 502 (D. Mass. 1996).

n180. 44 U.S. (3 How.) 212 (1845).

n181. U.S. Const. art. IV, 3, cl. 2.

n182. *Id.*

n183. Pollard's Lessee, 44 U.S. (3 How.) at 212.

n184. Scott v. Lattig, 227 U.S. 229, 244 (1913) (holding that title to an island within a stream did not pass from the United States to the state of Idaho).

n185. Nevada Statehood Act of March 21, 1864, 4, 13 Stat. 30, 31.

n186. Id.

n187. 426 U.S. 529 (1976).

n188. Id. at 543.

n189. 16 U.S.C. 668-668d (1994).

n190. 42 U.S.C. 2000bb to 2000bb-4 (1994).

n191. 16 U.S.C. 668(a) (1994).

n192. Id. 668a; 50 C.F.R. 22.22 (1997).

n193. 42 U.S.C. 2000bb-1(b) (1994).

n194. Unites States v. Stenberg, 803 F.2d 422, 430-31 (9th Cir. 1986).