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# 2020 NEPA Case Law Update

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# NEPA Litigation

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- There is no NEPA cause of action – challenges to an agency decision not made in accordance with NEPA are brought under the Administrative Procedure Act (APA)
    - "Arbitrary and capricious" standard
- Plaintiffs must show they are within the "zone of interests" protected by NEPA and that they are or would be harmed if the agency's decision were implemented
    - Plaintiffs must raise their concerns during the agency's NEPA process

# NEPA Remedies

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Typical remedies for violations of NEPA under the Administrative Procedure Act (APA), 5 U.S.C. § 706, include:

(1) reversing and remanding without instructions to vacate,

(2) reversing and remanding with instructions to vacate,

(3) equitable relief (injunction),

(4) declaratory relief (declaratory judgment), and

(5) mandamus.

The court may also retain jurisdiction over the matter until resolved

# Federal Court System

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- Challenges to NEPA/APA involve federal actions and are brought in federal court
  - District courts (one or more in each state)
  - Courts of Appeal (several states within one circuit; 11 circuits of general jurisdiction and 1 of special jurisdiction [Federal Circuit])
  - U.S. Supreme Court (only takes cases it agrees to hear – usually to address differences in the circuits or constitutional questions)

# Jurisdiction of Federal Courts of Appeal

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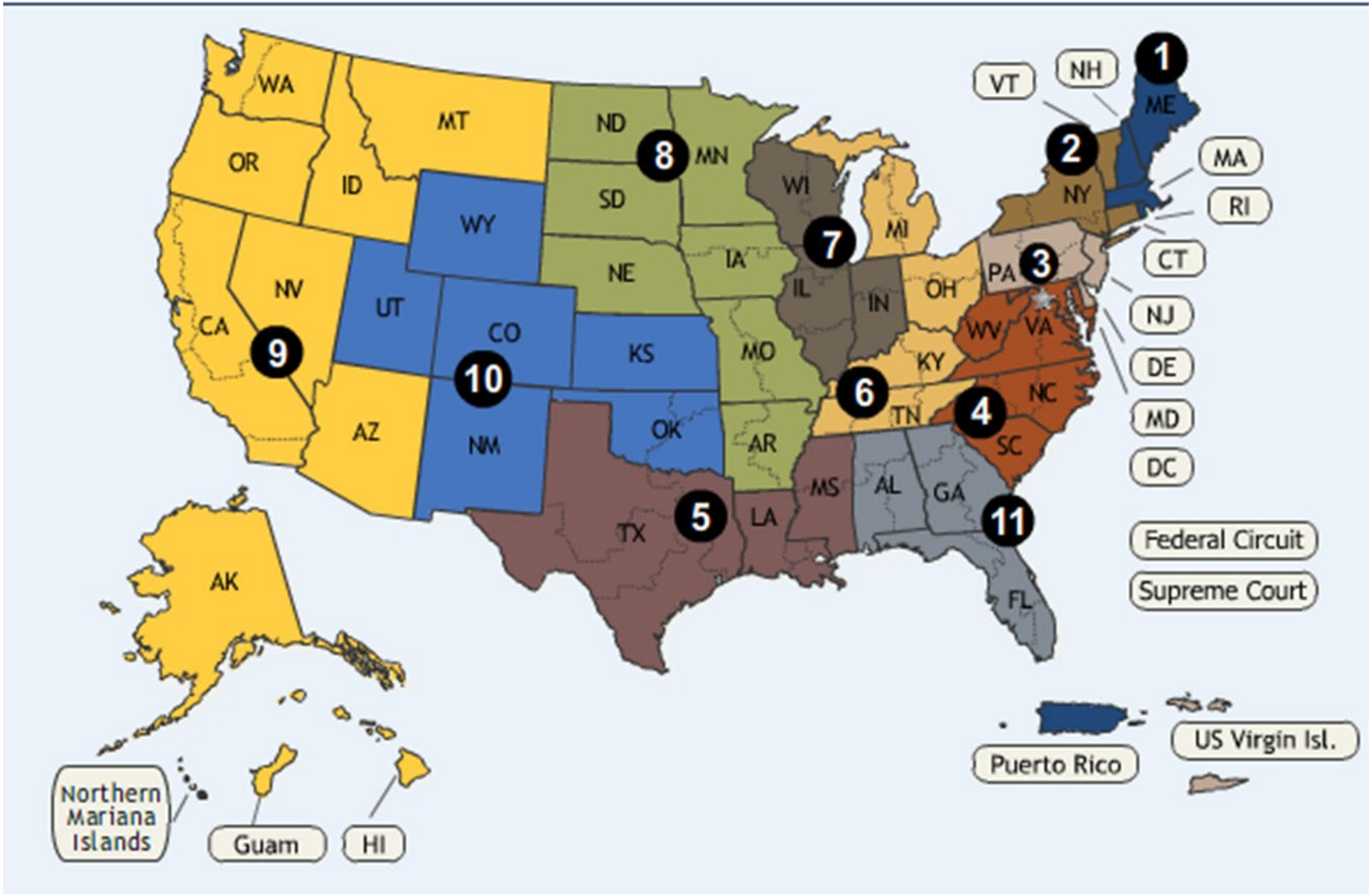

# 2020 NEPA Litigation Statistics

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- U.S. Courts of Appeals issued 24 NEPA decisions (where courts reviewed NEPA documents) in 2020, 19 in the 9th 2 in the 11th, and 1 each in the 2nd, 5th and 6th
- 5 different agencies:
  - USDA (USFS/ARS/US Sheep Exp. Station) – 12 cases (did not prevail in 1 case and prevailed in one claim but not prevail in the other case)
  - DOI (BLM, NPS, FWS, BOEM) – 10 cases (did not prevail in 1 case and in other two cases (one which it was co-defendant with USDA, prevailed on one NEPA claim but not all in the other claim)
  - DOT - 2 cases (prevailed)
  - DOD (US Navy) – 1 case (prevailed)
- Government prevailed in **79% (83%** if partial counted) of the cases

# Comparison to Previous Years

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| | U.S. Courts of Appeals Circuits | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1st | 2nd | 3rd | 4th | 5th | 6th | 7th | 8th | 9th | 10th | 11th | D.C. | TOTAL |
| 2006 | | | | | 3 | | 1 | 1 | 11 | 6 | | 1 | 23 |
| 2007 | 1 | | | | 1 | | | | 8 | 2 | | 3 | 15 |
| 2008 | 1 | 1 | 1 | | | | | 2 | 13 | 3 | 1 | 2 | 24 |
| 2009 | 1 | 3 | 1 | 2 | 1 | 1 | | 1 | 13 | 2 | | 2 | 27 |
| 2010 | | 1 | | | | 2 | 1 | 1 | 12 | 4 | 1 | 1 | 23 |
| 2011 | 1 | | 1 | | | | | | 12 | | | | 14 |
| 2012 | 2 | 1 | 2 | 3 | 1 | | 1 | | 12 | 3 | 2 | 1 | 28 |
| 2013 | 2 | | | 2 | | 1 | 1 | | 9 | 2 | 1 | 3 | 21 |
| 2014 | | | | 2 | | 5 | | | 10 | 2 | | 3 | 22 |
| 2015 | 1 | | | | | 1 | | | 6 | 2 | | 4 | 14 |
| 2016 | | | | 2 | | 1 | 1 | | 14 | 1 | 1 | 7 | 27 |
| 2017 | | 1 | 1 | | 1 | | | | 13 | 1 | | 8 | 25 |
| 2018 | | | 1 | 3 | 2 | 1 | | | 16 | | 3 | 9 | 35 |
| 2019 | | | | 1 | | | 1 | 1 | 9 | 2 | 1 | 6 | 21 |
| 2020 | | 1 | | | 1 | 1 | | | 19 | | 2 | | 24 |
| TOTAL | 9 | 8 | 7 | 15 | 10 | 13 | 6 | 6 | 177 | 30 | 12 | 50 | 343 |
| Proportion | 2% | 2% | 2% | 5% | 3% | 4% | 2% | 2% | 52% | 9% | 3% | 14% | |

# 2020 Case Trends

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- 20 (of 24) cases involved challenges to impact analysis
  - 6 cases, CATEX
  - 8 cases - direct impacts
  - 2 cases - indirect impacts (GHG)
  - 5 cases - cumulative impacts

Note: *Bark v. U.S. Forest Serv.,* 958 F.3d 865 (9th Cir. 2020) involved challenges to both direct impacts and cumulative impacts

# 2020 Case Trends (con't)

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- 5 cases involved involved whether an agency's action qualified as a federal action
  - *National Wildlife Fed'n v. Sec'y of the U.S. Dep't of Transp*., 960 F.3d 872 (6th Cir. 2020) (holding that the agency's approval of oil spill response plans did not trigger the requirement for an impact statement because the agency had no discretion to act otherwise).
- 5 cases involved challenges to sufficiency of alternatives
- 3 cases involved an agency's duty to supplement
- 2 cases considered whether agencies segmented their activities or decisions

# Challenge to Alternatives

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*High Country Conservation Advocates v. U.S. Forest Serv.*, 951 F.3d 1217 (10th Cir. 2020)

Environmental organizations (collectively, High Country) challenged the USFS' and BLM's approval of mining exploration activities (including road construction, in roadless areas located on national forest lands) and modifications to a mine operator's (Mountain Coal Company, LLC) lease adding new lands for mining located on National Forest lands near the North Fork of the Gunnison River in Colorado

# *High Country v. USFS* (con't)

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# *High Country v. USFS* (con't)

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- This appeal involved a long-running dispute concerning road construction and coal leases in National Forest lands near the North Fork of the Gunnison River in Colorado
- The North Fork Coal Mining Area includes parts of three roadless areas: Pilot Knob, Sunset, and Flatirons. The Flatirons and Sunset Roadless Areas are south of the North Fork River and Highway 133. The Pilot Knob Roadless Area is separated from the others, lying north of the river and highway
- In prior litigation, a district court concluded that the agencies' decisions violated NEPA
- Following these decisions, the Forest Service prepared a North Fork SEIS and readopted the Exception, Roadless Area Conservation. The applicant, Mountain Coal submitted lease modification requests in connection with coal leases in the area. In response, the Forest Service and BLM issued a Leasing SEIS and approved the requests

# *High Country v. USFS* (con't)

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- High Country alleged that the agencies violated NEPA by unreasonably eliminating alternatives from detailed study in the North Fork SFEIS and the Leasing SFEIS.
- Submitted comment in Draft North Fork SFEIS, requesting that the USFS analyze an alternative that would prohibit road construction in the Pilot Knob Roadless Area but permit it in the other two areas

# *High Country v. USFS* (con't)

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- In the North Fork SFEIS, the Service eliminated the Pilot Knob Alternative from detailed study with the following explanation:

  This alternative would remove the Pilot Knob Roadless Area, about 5,000 acres (about 25%) of the project area, from the North Fork Coal Mining Area. This alternative was dismissed from detailed analysis because the Colorado Roadless Rule is considering access to coal resources within the North Coal Mining Area [sic] over the long-term based on where recoverable coal resources might occur. The Rule preserves the option of future coal exploration and development by allowing temporary road construction for coal exploration and coal-related surface activities. One of the State-specific concerns is the stability of local economies in the North Fork Valley and recognition of the contribution that the coal industry provides to those communities. Preserving coal exploration and development opportunities in the area is a means of providing community stability

# *High Country v. USFS* (con't)

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- Instead, the USFS offered detailed analyses of three options:
  - (A) no action, which would preserve all three areas as roadless
  - (B) promulgation of the entire North Fork Exception, permitting mining on 19,700 acres and providing access to 172 million short tons of coal, and
  - (C) promulgation of the North Fork Exception excluding "wilderness capable" lands in the Sunset and Flatirons Roadless Areas, which would protect 7100 acres, permit mining on 12,600 acres, and provide access to 95 million short tons of coal
  - Ultimately, the USFS adopted Alternative B, reimplementing the entire North Fork Exception

# *High Country v. USFS* (con't)

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- Mountain Coal then resubmitted two applications for lease modifications, seeking to add a total of approximately 1720 acres to federal coal leases adjacent to the West Elk Mine
- In response to the requests, the USFS and BLM issued a draft of the Leasing SFEIS
- High Country requested that the agencies analyze a Methane Flaring Alternative in the final version
- Flaring converts methane, an especially potent greenhouse gas, to carbon dioxide, a less potent greenhouse gas. Under the Methane Flaring Alternative, Mountain Coal would be required to flare methane, thereby mitigating the environmental impact
- In the Leasing SFEIS, the agencies eliminated the Methane Flaring Alternative from detailed study, concluding that evaluating methane mitigation measures requires site-specific data and engineering designs unavailable at the leasing stage

# *High Country v. USFS* (con't)

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- Court reviewed objectives of the SFEIS:
  - "the specific purpose and need for reinstating the North Fork Coal Mining Area exception is to provide management direction for conserving about 4.2 million acres of [Colorado roadless areas] while addressing the state's interest in not foreclosing opportunities for exploration and development of coal resources in the North Fork Coal Mining Area."
  - The North Fork SFEIS recognized the "need . . . to provide for the conservation and management of roadless area characteristics," including "sources of drinking water, important fish and wildlife habitat, semi-primitive or primitive recreation areas . . . and naturally appearing landscapes." It also recognized the need to "facilitat[e] exploration and development of coal resources in the North Fork coal mining area."
- Tenth Circuit found Pilot Knob Alternative fit within project's goals and facilitated coal resources in two others

# *High Country v. USFS* (con't)

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- The USFS asserted that the idled Elk Creek Mine, located in the Pilot Knob Roadless Area, presents distinct long-term opportunities for coal access that would be foreclosed by the Pilot Knob Alternative but not by Alternative C – but the Tenth Circuit found this was inconsistent with the explanation in the EIS
- "We cannot consider a "post-hoc rationalization" for eliminating an alternative from consideration in an EIS"

# *High Country v. USFS* (con't)

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- The Tenth Circuit rejected the USFS' argument that the Pilot Knob Alternative was not significantly distinguishable from Alternative C
  - Alternative C would protect 7100 acres of wilderness, whereas the Pilot Knob Alternative would protect 4900 acres -- nearly 30% less land
  - This 2100-acre difference represents more than 10% of the entire North Fork Coal Mining Area
  - Alternative C would allow access to 95 million short tons of coal, whereas the Pilot Knob Alternative would allow access to 128 million short tons of coal
  - This represents 33 million short tons, which is approximately 35% more coal than Alternative C and 19% of the total amount of coal recoverable in the entire North Fork Coal Mining Area
  - The alternative would result in significantly different environmental impacts because the Pilot Knob Roadless Area is geographically separate from, and has habitat features dissimilar to, the Sunset and Flatirons Roadless Areas

# *High Country v. USFS* (con't)

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- In its second claim, High Country challenged the elimination from detailed study of the Methane Flaring Alternative in the agencies' promulgation of the Leasing SFEIS
- The Leasing SFEIS's stated purpose was to "facilitate recovery of federal coal resources in an environmentally sound manner"
- The Tenth Circuit found at the time issued the Leasing SFEIS, it was uncertain whether MSHA would approve methane flaring for an active coal mine, thus it was reasonable for the Service and BLM to eliminate the Methane Flaring Alternative from detailed study

# Challenge to Alternatives

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*Friends of Animals v. Romero*, 948 F.3d 579 (2d Cir. 2020)

Friends of Animals challenged the NPS' adoption of white-tailed deer management plan for Fire Island National Seashore, a barrier island national park

# *Friends of Animals v. Romero* (con't)

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- Fire Island is a narrow 32-mile long barrier island off the south shore of Long Island. It is home to the Seashore, which runs from the Robert Moses State Park in the west to the end of the island in the east
- The Seashore was established in 1964 as part of the National Park System, for "the purpose of conserving and preserving for the use of future generations certain relatively unspoiled and undeveloped beaches, dunes, and other natural features within Suffolk County, New York, which possess high value[ ] to the Nation as examples of unspoiled areas of great natural beauty in close proximity to large concentrations of urban population"

16 U.S.C. §459e(a).

# *Friends of Animals v. Romero* (con't)

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- Explosion of deer population in 1970's brought concerns about Lyme disease and destruction of Seashore's vegetation. In 1980's Seashore staff began studying deer
- NPS initiated the NEPA planning process in October 2010
- Its goal was to "develop a deer management strategy that supports protection, preservation, regeneration, and restoration of native vegetation and other natural and cultural resources at the Seashore and reduces undesirable human-deer interactions in the Fire Island communities."

# *Friends of Animals v. Romero* (con't)

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- Final EIS completed in December 2015 with a ROD in April 2016
- The EIS considered four alternative plans to manage the deer problem at the Seashore.
  - Alternative A, the no action alternative, involved the continuation of "current management actions, policies, and monitoring efforts related to deer and their effects." It was rejected because it did not further the Plan's objectives as "no-action would be taken to reduce deer numbers or effect a change in conditions that are the basis for the purpose of and need for action"
  - Alternatives B, C, and D, the action alternatives, all contained certain common elements to manage the adverse effects of the deer population: enhanced public education and outreach, fencing at the Sunken Forest and the William Floyd Estate, enhanced deer population and vegetation monitoring, and coordination with the New York State Department of Environmental Conservation
- Each action alternative also proposed a Seashore-wide target deer density of 20-25 deer per square mile

# *Friends of Animals v. Romero* (con't)

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- The EIS considered, but dismissed from further analysis, the use of site-specific target deer densities for different areas within the Seashore, rather than a Seashore-wide target deer density
- Alternative B recommended the use of a fertility control agent
- Alternatives C and D used direct reduction methods such as sharpshooting, capture and euthanasia, and public deer hunting
- NPS chose a modified version of Alternative D because it "reduce[d] deer density quickly, providing immediate relief from the adverse impacts of deer browsing, and because it incorporates a wider range of management options than the other alternatives evaluated," providing "for both an efficient initial removal of deer and flexibility in management methods to address future control of deer density in different ways"

# *Friends of Animals v. Romero* (con't)

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- Court reviewed NPS's rationale for rejecting Alternative B, which did contain a mechanism to reduce the deer population. Alternative B contained the six elements Friends proposes, along with the use of a fertility control agent to reduce the deer population.
- It was rejected because it would take too long to reduce the deer population -- if use of the fertility control agent did not achieve the deer density goal, the adverse impacts to vegetation could reach a "tipping point" from which recovery might not be possible
- The NPS thoroughly examined that alternative, which contained a method to reduce the deer population, and reasonably concluded that it would not further the Plan's objectives
- Court held there was no question that Friends' proposed alternative, which contains no mechanism to reduce the deer population, would not "partially or completely" meet the Plan's goals and NPS was not obligated to consider it

# Impact Assessment

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## 40 C.F.R. §1502.23 Methodology and Scientific Accuracy.

Agencies shall ~~i~~ensure the professional integrity, including scientific integrity, of the discussions and analyses in environmental documents~~impact statements~~. Agencies shall make use of reliable existing data and resources. Agencies may make use of any reliable data sources, such as remotely gathered information or statistical models. They shall identify any methodologies used and shall make explicit reference ~~by footnote~~ to the scientific and other sources relied upon for conclusions in the statement. A~~n a~~gencies~~y~~ may place discussion of methodology in an appendix. Agencies are not required to undertake new scientific and technical research to inform their analyses. Nothing in this section is intended to prohibit agencies from compliance with the requirements of other statutes pertaining to scientific and technical research.

# Categorical Exclusions

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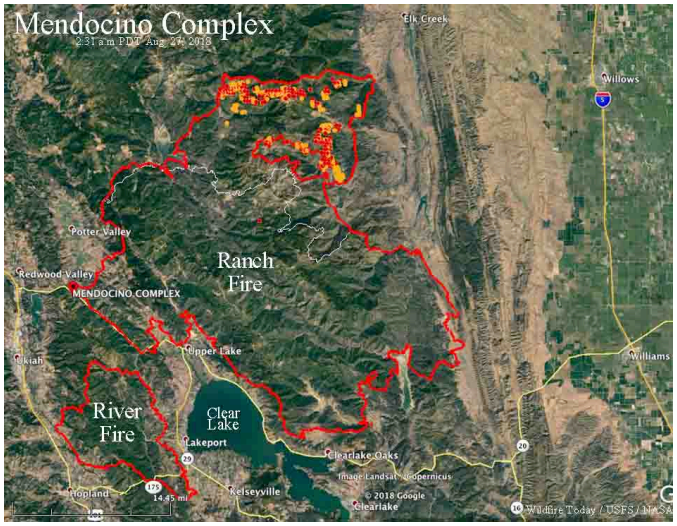
*Envt'l Prot. Info. Ctr. v. Carlson*, 968 F.3d 985 (9th Cir. 2020)




EPIC challenged the USFS' determination that a project for removal of fire-damaged trees near roads in Mendocino National Forest fell within a CATEX for road repair and maintenance

# *Epic v. Carlson* (con't)

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- In July 2018, the Ranch Fire burned more than 400,000 acres in Northern California, including almost 300,000 acres in the Mendocino National Forest. After the fire, the Service approved the Ranch Fire Roadside Hazard Tree Project
- The Project authorized the Forest Service to solicit bids from private logging companies for the right to fell and remove large fire-damaged trees up to 200 feet from either side of roads in the National Forest
- District Court denied PI; Ninth Circuit reversed denial of PI and remanded for further proceedings

# *Epic v. Carlson* (con't)

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- "The primary purpose of the Project is to reduce current and potential safety hazards along roads [in the National Forest] to create a safe transportation system . . . [T]he Project plans to remove hazard trees through a series of salvage sales"
- Carlson stated in a declaration in the district court that the Project's "[r]oadside hazard treatments involve removing only trees that constitute hazards to the selected roads . . . and that have the potential to reach roadways"

# *Epic v. Carlson* (con't)

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- There are two CATEXs potentially relevant to the Project. One is for "repair and maintenance" of roads in the National Forest. The other is for "salvage" logging of "fire-damaged trees" on tracts of 250 acres or less

# *Epic v. Carlson* (con't)

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- Two potential CATEXs:
  - The first CATEX covered:
    - (4) Repair and maintenance of roads, trails, and landline boundaries. Examples include but are not limited to:
      - (i) Authorizing a user to grade, resurface, and clean the culverts of an established NFS road;
      - (ii) Grading a road and clearing the roadside of brush without the use of herbicides;
      - (iii) Resurfacing a road to its original condition;
      - (iv) Pruning vegetation and cleaning culverts along a trail and grooming the surface of the trail; and
      - (v) Surveying, painting, and posting landline boundaries.

    36 C.F.R. § 220.6(d)(4) (no documentation required)

# *Epic v. Carlson* (con't)

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- Two potential CATEXs:
  - The second CATEX covered:
    - (13) Salvage of dead and/or dying trees not to exceed 250 acres, requiring no more than ½ mile of temporary road construction. The proposed action may include incidental removal of live or dead trees for landings, skid trails, and road clearing. Examples include, but are not limited to:
      - (i) Harvest of a portion of a stand damaged by a wind or ice event and construction of a short temporary road to access the damaged trees, and
      - (ii) Harvest of fire-damaged trees.

    36 C.F.R. § 220.6(e)(13) (requires documentation)

# *Epic v. Carlson* (con't)

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- The court examined whether an extensive commercial logging project that includes felling large, partially burned "merchantable" trees—including 100- and 111-foot trees located 150 and 166 feet from roads, as well as taller trees even farther away—is "repair and maintenance" within the meaning of § 220.6(d)(4)

- The court discussed that while all of the trees within the scope of the Project may be hazardous in some sense, many of them pose no imminent hazard; a number of the trees will not come close to the road even if they fall directly toward it

- The court opined that felling a dangerous dead or dying tree right next to the road comes within the scope of the "repair and maintenance" CATEX. The court found the Project allowed the felling of many more trees than within the scope of the CATEX

# *Epic v. Carlson* (con't)

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- The rationale for a CATEX is that a project that will have only a minimal impact on the environment should be allowed to proceed without an EIS or and EA. The CATEX upon which the USFS relied upon authorized projects for such things as grading and resurfacing of existing roads, cleaning existing culverts, and clearing roadside brush
- A CATEX of such limited scope cannot reasonably be interpreted to authorize a Project such as the one before us, which allows commercial logging of large trees up to 200 feet away from either side of hundreds of miles of Service roads
- Under no reasonable interpretation of its language does the Project come within the CATEX for "repair and maintenance" of roads

# *Epic v. Carlson* (con't)

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- Then what could the USFS have done?
  - Document First CATEX?
  - Request legal review? (regs do not require documentation and typically projects that do not require documentation do not trigger legal review at agencies) OR (request legal review when projects have potential for significance or are potentially outside project boundaries)?
  - Document use of CATEX No. 2?
  - CEQ Alternatives Arrangements?
  - Fire Management Plan?

# *Epic v. Carlson* (con't)

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- Healthy Dissent by Circuit Judge Lee:
- The Project may not be optimally designed for the reasons outlined by the majority but "big problems often require big and imperfect solutions"
- Judge Lee would not second-guess an imperfect plan fashioned by the USFS, even if the courts could have crafted a better tailored one
- The Forest Service responded with an imperfect but workable solution: Salvage operators will remove at their expense dying trees that threaten high-priority roadways and pay the USFS for that privilege
- The agency designed the Project with sufficiently strict criteria, requiring operators to remove only what is reasonably necessary to further road safety and maintenance
- Judge Lee would affirm "this plausible plan"

# Impact Assessment (Direct Impacts):

*Bark v. U.S. Forest Serv*., 958 F.3d 865 (9th Cir. 2020

- Conservation organizations (Bark) challenged the USFS' forest management project and timber sale, the Crystal Clear Restoration Project (CCR) affecting 11,742 acres in Mt. Hood National Forest
- The Ninth Circuit reversed and remanded the lower court's grant of summary judgment for agency

# *Bark v. USFS* (con't)

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- The project proposes thinning 12,000 acres in the forest to reduce the risk of wildfires
- The USFS completed an EA and FONSI
- According to the EA, forest stands in the area tend to be overstocked as a result of past management practices. When trees are closer together, they are more susceptible to insects and disease and to high-intensity wildfires
- The USFS undertook the CCR Project in order to "provide forest products from specific locations within the planning area where there is a need to improve stand conditions, reduce the risk of high-intensity wildfires, and promote safe fire suppression activities"

# *Bark v. USFS* (con't)

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- The agency planned to achieve these goals in part using a technique called "variable density thinning"
- "In variable density thinning, selected trees of all sizes . . . would be removed." This process would assertedly make the treated areas "more resilient to perturbations such as . . . large-scale high-intensity fire occurrence because of the reductions in total stand density."

# *Bark v. USFS* (con't)

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- Bark claimed the USFS did not undertake a proper analysis of the significant impacts of the Project.
- The stated primary purpose of the CCR Project is to reduce the risk of wildfires and promote safe fire-suppression activities, but Bark identified considerable scientific evidence showing that variable density thinning will not achieve this purpose

# *Bark v. USFS* (con't)

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- Substantial expert opinion presented by the Bark disputed the USFS' conclusion that thinning is helpful for fire suppression and safety
- For example, Oregon Wild pointed out in its EA comments that "[f]uel treatments have a modest effect on fire behavior, and could even make fire worse instead of better." It averred that removing mature trees is especially likely to have a net negative effect on fire suppression. Importantly, the organization pointed to expert studies and research reviews that support this assertion

# *Bark v. USFS* (con't)

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- Bark raised the issue in its comments that it is commonly accepted that reducing fuels does not consistently prevent large forest fires, and seldom significantly reduces the outcome of these large fires from an article from Forest Ecology and Management
- Bark provided a recent study published in The Open Forest Science Journal, which concluded that fuel treatments are unlikely to reduce fire severity and consequent impacts, because often the treated area is not affected by fire before the fuels return to normal levels.
- Bark further noted that it raised these studies and their findings during the scoping process but that the EA did not address any of the comments.

# *Bark v. USFS* (con't)

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- The Ninth Circuit agreed with Bark's claims.
- It found the effects of the Project were highly controversial and uncertain, thus mandating the creation of an EIS. *See* 40 C.F.R. § 1508.27(b)(4) & (5) (listing relevant factors for whether an EIS is required, including if the project's effects are "highly controversial" and "highly uncertain")
- A project is 'highly controversial' if there is a 'substantial dispute [about] the size, nature, or effect of the major Federal action rather than the existence of opposition to a use.' " *Native Ecosystems Council*, 428 F.3d 1233, 1240 (9th Cir. 2005). "A substantial dispute exists when evidence . . . casts serious doubt upon the reasonableness of an agency's conclusions." *In Def. of Animals*, 751 F.3d 1054, 1069 (9th Cir. 2014). "[M]ere opposition alone is insufficient to support a finding of controversy." *WildEarth Guardians v. Provencio*, 923 F.3d 655, 673 (9th Cir. 2019)

# *Bark v. USFS* (con't)

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- The Ninth Circuit found that Bark thus proved a substantial dispute about the effect of variable density thinning on fire suppression
- Throughout the USFS' investigative process, Bark pointed to numerous expert sources concluding that thinning activities do not improve fire outcomes
- In its responses to these comments and in its FONSI, the USFS reiterated its conclusions about vegetation management but did not engage with the substantial body of research cited by Bark
- Thus, the USFS' decision not to prepare an EIS was arbitrary and capricious

# *Bark v. USFS* (con't)

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- *If the EA were prepared under the new Rule, would the outcome be the same?*

# Impact Assessment (Direct Impacts):

*Bair v. California Dep't of Transp.*, 982 F.3d 569 (9th Cir. 2020)

Picture courtesy of Cal. Parks and Rec.

- Individual and environmental organizations challenged the California Department of Transportation's (Caltrans) U.S. Highway 101 improvement project through Richardson Grove State Park, comprised of redwood forests of southern Humboldt County, California
- https://dot.ca.gov/caltrans-near-me/district-1/d1-projects/d1-richardson-grove-improvement-project

# *Bair v. Cal. DOT* (con't)

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- Richardson Grove State Park comprises approximately 2,000 acres within the redwood forests of southern Humboldt County, California, and is bisected by United States Highway 101
- Purpose and Need:
  - Industry standard-sized trucks conforming to the Surface Transportation Assistance Act (STAA) are currently prohibited from traveling Route 101 north of Leggett due to the narrow alignment at Richardson Grove
  - This location is one of the few remaining areas of the state in which these trucks are not permitted. As STAA trucks have become the national standard, communities with routes unable to provide STAA access are at an economic disadvantage. Truck cargo must be unloaded and transferred to shorter trucks, making goods movement more expensive
  - The truck restrictions at Richardson Grove are due to the tightness of the curves, making it difficult for longer trucks to stay within the traveled way. The 1.1 mile stretch of Richardson Grove is the only remaining location on Route 101 restricting access of STAA trucks traveling into Humboldt County from the south
  - This project will adjust the roadway alignment to accommodate STAA truck travel through Richardson Grove. Improvement of goods movement will help local businesses stay competitive in the marketplace

# *Bair v. Cal. DOT* (con't)

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- The original 2010 EA included extensive analysis of the Project's environmental effects and efforts to minimize those effects (developed in consultation with the California Department of Parks and Recreation. More than 100 pages of the 2010 EA were devoted to analyzing various environmental impacts, such as the effects on the nearby South Fork Eel River, the Grove and its recreation facilities, economic growth, traffic, water quality, noise, local plant and animal species (particularly old-growth redwood trees), and protected or threatened species
- Caltrans ultimately determined that the impacts to the Grove would be minor, and would primarily consist of "tree removal resulting from cuts and fills that are necessary to accommodate the highway improvements"

# *Bair v. Cal. DOT* (con't)

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- Bair filed suit regarding the Project in both 2010 and 2014 each time making similar claims
- In the first litigation, the district court granted partial summary judgment to the plaintiffs and ordered Caltrans to undertake additional studies, such as preparing new maps of each old-growth redwood tree, its root health zone, and the environmental impacts to each tree. Caltrans then revised its analysis accordingly
- After commissioning a tree report from arborist Yniguez, it issued a 2013 Supplement to the 2010 EA
- Caltrans then took public comments, responded to them, and finally issued a NEPA Revalidation for the Project in January 2014. It found that the 2010 EA and FONSI remained valid

# *Bair v. Cal. DOT* (con't)

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- Bair's second litigation was dismissed after Caltrans withdrew the FONSI in light of an adverse ruling in a parallel proceeding. In response to the California court's order, Caltrans slightly reduced the scope of the Project, and the arborist prepared another tree report (Caltrans considered and analyzed other scientific evidence as well)
- In May 2017, Caltrans issued revisions to the EA and a new FONSI

# *Bair v. Cal. DOT* (con't)

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- Bair challenged the 2017 EA and FONSI and the lower court granted partial summary judgement against Caltrans

- The district court identified certain issues that, in its view, Caltrans had not adequately considered: whether (1) redwoods would suffocate when more than half of their root zones were covered by pavement; (2) construction in a redwood's structural root zone would cause root disease; (3) traffic noise would increase because of the larger size of the STAA trucks or because of additional numbers of trucks; and (4) redwoods would suffer more frequent and severe damage as a result of strikes by STAA trucks

- The Ninth Circuit reversed and remanded

# ***Bair v. Cal. DOT*** (con't)

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- First, as to redwood tree suffocation:
  - Caltrans sufficiently considered the effect of paving over portions of tree root zones
  - The Project planned to use a special material to allow greater porosity and to promote air circulation under the asphalt, and Caltrans considered the aggregate amount of new roadbed material that would be placed over the structural root zones
  - Caltrans thoroughly assessed the amount of paving that would be placed over the root zone of each tree
  - Caltrans considered the possibility that paving could harm the trees, but simply (and reasonably) concluded that there was sufficient evidence to the contrary

# *Bair v. Cal. DOT* (con't)

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- Second, as to construction within tree zones:
  - Caltrans appropriately considered the extent and effect of the construction activity that would occur in the structural root zones of redwood trees, including construction guidelines in a State Parks handbook
  - The Ninth Circuit found that Caltrans provided comprehensive analyses of the extent and effects of construction activity in the root zones of individual trees
  - State Parks' handbook contained contrary recommendations but the Ninth Circuit discussed that the administrative record may contain contradictory and conflicting opinions, expert and otherwise, and does not require an agency to follow all recommendations made by commentators, other agencies, or experts
  - Caltrans could (and did) reasonably refuse to follow (the State Park Handbook) especially when Caltrans relied upon evidence specifically pertaining to the effects of construction on redwoods in general and the redwoods in the Project area, in particular

# *Bair v. Cal. DOT* (con't)

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- Third as to traffic volume and noise:
- Caltrans adequately considered how the visitor experience to the Grove would be affected by the presence of STAA trucks
- Concluded that truck traffic would not increase as a result of the Project (surveys, traffic studies, latent demand for route and faster travel time of Interstate 5)
- Caltrans reasonably concluded from that evidence that traffic would not increase as a result of the Project.
- Thus, Caltrans' conclusion that traffic would not increase (and thus, noise would not increase) was entitled to deference

# *Bair v. Cal. DOT* (con't)

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- Fourth, as to collisions to trees and severity:
  - Reasonably concluded widening roads decreases instances of vehicle collisions even if trees closer to road on some parts but further away on other parts of road
  - Caltrans' conclusions regarding the frequency of collisions were reasonable and entitled to deference, especially because they pertain to an an area of agency expertise
  - As to damage severity, no evidence existed in record
  - Caltrans is not required "to address in detail . . . every single comment . . . to prove that [it] 'considered' the relevant factors," much less to anticipate conclusory supposition about speculative and tangential effects that are not supported by evidence in the record

# *Bair v. Cal. DOT* (con't)

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- Circuit Judge Wardlaw issued a concurring opinion, with slight reservations in these "tumultuous times"
- The concurring opinion focused on three prongs:

  1) the "nightmarish administrative record";

  2) Caltrans' acknowledgement of its duty to supplement; and,

  3) the likelihood of new data on the effects of construction on old-growth redwoods, which would prove important to future decisions surrounding these historic trees, and—if that data becomes available during the project—to Caltrans' decision to supplement.

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# Indirect Impacts Cases

# *Center for Biological Diversity v. Bernhardt*, 982 F. 3d 723 (9th Cir. 2020)

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Center for Biological Diversity, Defenders of Wildlife, Friends of the Earth, Greenpeace USA & Pacific Environment ("CBD") petitioned for review of BOEM's approval of Hilcorp's application to construct an offshore drilling and production facility for the purposes of oil extraction in Foggy Island Bay, along the coast of Alaska in the Beaufort Sea

# *CBD v. Bernhardt* (con't)

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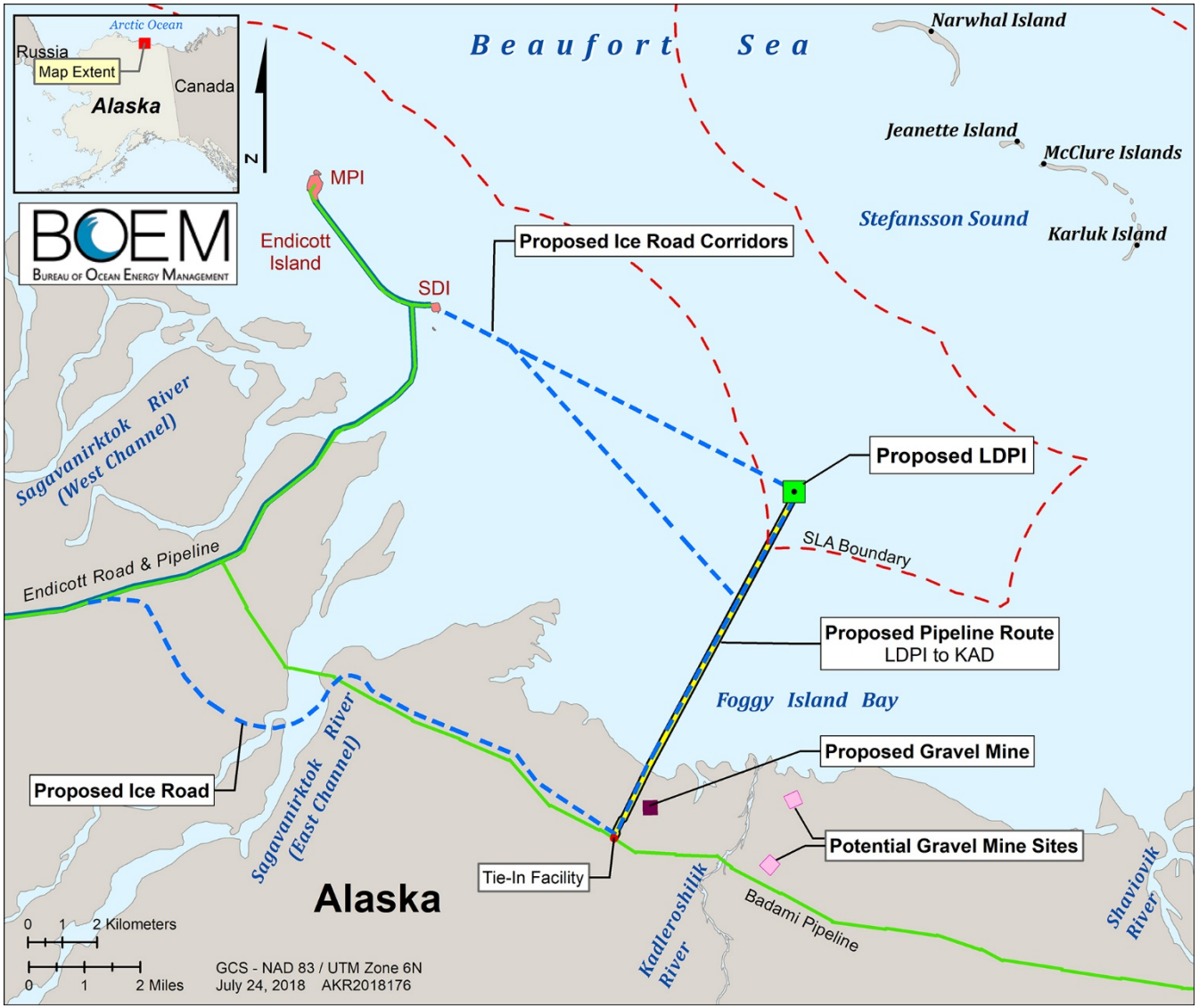

# *CBD v. Bernhardt* (con't)

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Rendering of a 24-acre gravel island to drill for oil in the shallow waters off the North Slope (and includes a subterranean pipeline to move the oil over 5 miles back to shore)

# *CBD v. Bernhardt* (con't)

National Association of Environmental Professionals
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- The Ninth Circuit vacated U.S. Department of the Interior approvals for a proposed offshore oil drilling and production facility in Alaska after finding its EIS improperly failed to consider impacts associated with foreign oil consumption
- *Liberty Project:*
  - Will produce approximately 120 million barrels of crude oil over 15 – 20 years
  - Construction of various new facilities: offshore gravel island, wells, a pipeline to transport the oil, a gravel mine, and additional ice roads and crossings
  - The Project site is characterized by its ecological diversity and for providing habitat and food sources for threatened and endangered marine mammals, including polar bears

# *CBD v. Bernhardt* (con't)

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- The Ninth Circuit on the first claim, disagreed with CBD's argument that BOEM's NEPA analyses used different methodologies to calculate the lifecycle greenhouse gas emissions from the project and the no-action alternative
- Counterintuitively, the EIS concluded that maintaining the status quo under the no-action alternative would result in greater air emissions of priority pollutants as compared with the Project because, BOEM said, the production gap would be filled with substitutes produced from countries with "comparatively weaker environmental protection standards"
- EIS did not quantify the purported change in foreign oil consumption
- BOEM argued that it could not have summarized or estimated foreign emissions associated with changes in foreign consumption with accurate or credible scientific evidence

# *CBD v. Bernhardt* (con't)

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- The court rejected BOEM's failure to either quantify downstream greenhouse gas emissions or to "thoroughly explain why such an estimate is impossible"
- The court specifically faulted the EIS for failing to "summarize existing research addressing foreign oil emissions" and for ignoring "basic economics principles," including changes to equilibrium price and demand effects of the Project
- The court declined to accord deference to BOEM's economic analysis of greenhouse gas emissions, stating that "BOEM's area of expertise is the management of 'conventional (e.g. oil and gas) and renewable energy-related' functions, including 'activities involving resource evaluation, planning, and leasing.'"

# *Natural Res. Def. Council v. Bernhardt,* No. 19-35006, 820 Fed. Appx. 520 (9th Cir. Jul. 9, 2020)

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- NRDC challenged BLM's approval of 2016 and 2017 Oil and Gas Leases, that largely relied on impacts assessed in the previous 2012 EIS

- *Would result be same today with the recent renewed emphasis on climate change and environmental justice?*

# *NRDC v. Bernhardt* (con't)

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- Challenge involved BLM's 2016 and 2017 oil and gas lease sales in the National Petroleum Reserve-Alaska
- BLM's 2012 EIS, prepared in combination with its Integrated Activity Plan (IAP) governing management of all BLM-managed lands in the Reserve, was the EIS for future lease sales
- NRDC made comments on the 2012 EIS -- the Court found that NRDC understood the 2012 EIS to cover future lease sales but simply thought it did so inadequately

# *NRDC v. Bernhardt* (con't)

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- The Ninth Circuit rejected NRDC's argument that the 2012 EIS could not have been the NEPA analysis for the 2016 and 2017 lease sales because it did not adequately assess the climate-change impacts of the 2016 and 2017 lease sales
- The court found that BLM's discussion of climate-change impacts did not differ substantially (if at all) from what NEPA required for individual lease sales as to preclude the conclusion that the lease sales were within the scope of actions considered in the 2012 EIS
- In sum, court did not consider the adequacy of the impact analysis (GHG) in the 2012 EIS because it found the scope of the 2012 EIS covered the recent lease sales and that the challenge would be time-barred under the statute of limitations

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# Cumulative Impacts Cases

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# Cumulative Impacts

With this proposed change and the proposed elimination of the definition of cumulative impacts, it is CEQ's intent to focus agencies on analysis of effects that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action.

# 2020 Cumulative Impacts Decisions

National Association of Environmental Professionals
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- *Bark v. USFS* (958 F.3d 865 – 9th Circuit)
- *Tinian Women Association v. U.S. Department of the Navy* (976 F.3d 832 – 9th Circuit)
- *Rivers v. BLM* (815 Fed. Appx 107 – 9th Circuit*)
- *Chilkat Indian Village of Klukwan v. BLM* (875 Fed Appx 425 – 9th Circuit*)
- *Wild Watershed v. Hurlocker* (961 F.3d 1119 – 10th Circuit)

# Results for 2020 cases

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- Appellate Court decisions on agency cumulative effects analyses challenges
- Agencies prevailed in 80% (4 of 5) of the opinions
  - 4 in the 9th Circuit
  - 1 in the 10th Circuit
- Agencies involved:
  - BLM (2 opinions)
  - USFS (2 opinions)
  - US Navy (1 opinion)

# Results for 2019 cases

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- Appellate Court decisions on agency cumulative impact analyses challenges
- Agencies prevailed in 50% (2 of 4) of the opinions
  - 2 in the 9th Circuit
  - 2 in the 10th Circuit
- Agencies involved:
  - BLM (1 opinion)
  - FAA (1 opinion)
  - USFS (2 opinions)

# Results for 2018 cases

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- Appellate Court decisions on agency cumulative impact analyses challenges
- Agencies prevailed in 80% (4 of 5) of the published opinions
- Agencies prevailed in 89% (8 of 9) of the unpublished opinions
  - 4 in the 9th Circuit
  - 3 in the DC Circuit
  - 2 in the 5th Circuit
- Agencies involved:
  - USACE (3 opinions)
  - FERC (2 opinions)
  - BLM, USFS, FAA, TXDOT (1 opinion each)

# *Bark v. USFS*, 958 F.3d 865 (9th Cir. 2020)

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- Crystal Clear Restoration project proposes thinning 12,000 acres in the Mt. Hood National Forest to reduce the risk of wildfires
- The USFS completed an EA and FONSI for the project
- Plaintiffs alleged EA contained an inadequate cumulative effects analysis

# *Bark v. USFS*, 958 F.3d 865 (9th Cir. 2020)

National Association of Environmental Professionals
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- Analysis limited to a 1.2-mile buffer around the project
- Plaintiffs commented that three recent or future projects were nearby but excluded from analysis
- Court concluded that nothing in the EA could be considered the “quantified or detailed information” required for an adequate cumulative effects analysis
- Numerous projects were identified in a table, but there was “no meaningful analysis” of any of the other projects in the EA

# *Bark v. USFS*, 958 F.3d 865 (9th Cir. 2020)

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- Text from EA:
  - "There are no direct or indirect effects that would cumulate from other projects due to the minimal amount of connectivity with past treatments" and that the project "would have a beneficial effect on the stands by moving them toward a more resilient condition that would allow fire to play a vital role in maintaining stand health, composition and structure."
- COURT:
  - "These are the kind of conclusory statements, based on vague and uncertain analysis, that are insufficient to satisfy NEPA's requirements."

# *Tinian Women Ass'n v. U.S. Dep't of the Navy*, 976 F.3d 832 (9th Cir. 2020)

National Association of Environmental Professionals
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- Challenge involved two EISs:
  - EIS for relocating 8,000 Marines from Okinawa to Guam
  - EIS for Live-Fire Training
- Plaintiffs alleged the Relocation EIS did not address the future training activities
- Court rules that since the Navy did a subsequent EIS for the training, that was adequate for considering the total cumulative effects; the Navy "impliedly promised" to consider subsequent action in the future EIS

# *Wild Watershed v. Hurlocker,* 961 F.3d 1119 (10th Cir. 2020)

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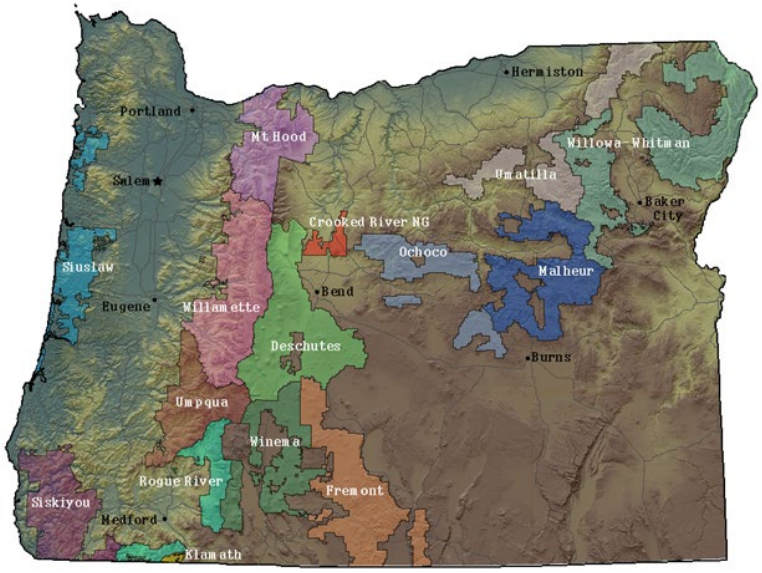
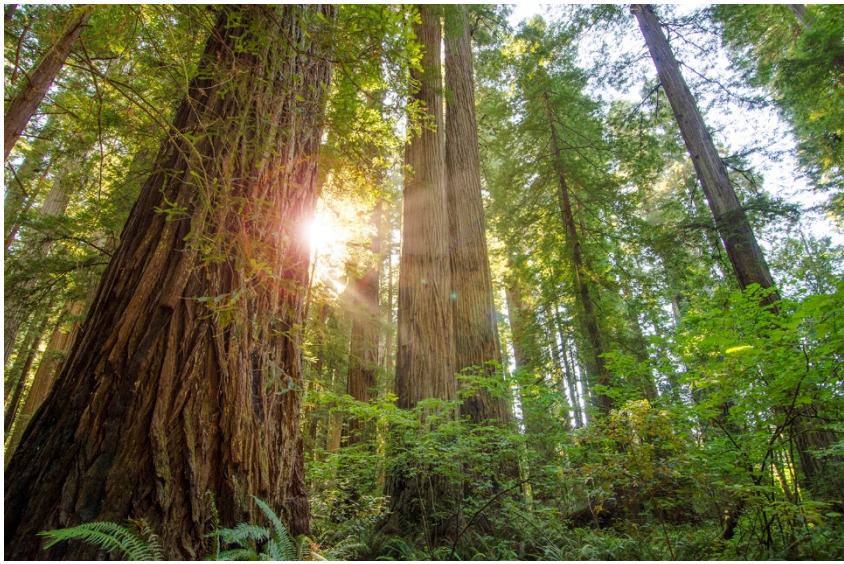
- Santa Fe National Forest used Categorical Exclusions for two forest thinning projects in inventoried roadless areas
- Plaintiffs alleged that other actions should have been considered in a cumulative effects context
- Court ruled that a map showing the other projects did not indicate what type of projects they were, and thus not clear they had a "cause-and-effect relationship" with the two CATEX'd thinning projects
- Future projects not planned and no funding identified – Court ruled they were thus "speculative" and did not require consideration

# *Rivers v. BLM,* No. 19-35384, 815 Fed. Appx 107 (9th Cir. May 15, 2020)

National Association of Environmental Professionals

- Challenge by Pacific Rivers to an EIS analyzing BLM's revisions to Resource Management Plans (RMPs) originally prepared in 1995
- Plaintiffs alleged the EIS was inadequate for failing to consider future "unspecified conduct by private landowners" in western Oregon checkerboard lands
- Courts rule in favor of the agency; BLM did consider the effects of "reasonably foreseeable future events" on private lands based on current management conditions; no requirement to speculate about "unspecified actions."



# *Chilkat Indian Villiage of Klukwan v. BLM,* No. 19-35424, 825 Fed. Appx 125 (9th Cir. Aug. 28, 2020)

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- Alaska Native Village and environmental organizations challenged BLM EA for the Palmer mining project in southeast Alaska
- Plaintiffs alleged improper analysis for leaving out a future mining project
- Court rules plaintiffs did not establish any "reliable study or projection of future mining" in the record
- Interest for a future mine but contained no estimate of the scale or scope; at best the "record contains evidence amounting to general plans for expanding mining."
  - COURT: "This alone does not require a cumulative impacts analysis."


# Questions/Comments?

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