NEPA CASE LAW—2020

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This paper reviews decisions on substantive NEPA cases issued by federal courts in 2020, and explains the implications of the decisions and their relevance to NEPA practitioners.

INTRODUCTION

In 2020, the U.S. Courts of Appeal issued 24 substantive decisions involving implementation of the National Environmental Policy Act (NEPA) by federal agencies. The 24 cases involved four different departments. Overall, the federal agencies prevailed in 19 of the cases, did not prevail in three cases, and prevailed on one NEPA claim but not the other NEPA claim in two cases, with a total prevail rate of 79 percent (83 percent if the partial cases are included). The U.S. Supreme Court issued no NEPA opinions in 2020; opinions from the U.S. District Courts were not reviewed.

For comparison purposes, Table 1 shows the number of U.S. Court of Appeals NEPA case decisions issued in 2006 – 2020, by circuit. The number of decisions issued in 2020 is slightly above the 2006 – 2020 annual average of 23 decisions. Figure 1 is a map showing the states covered in each circuit court.

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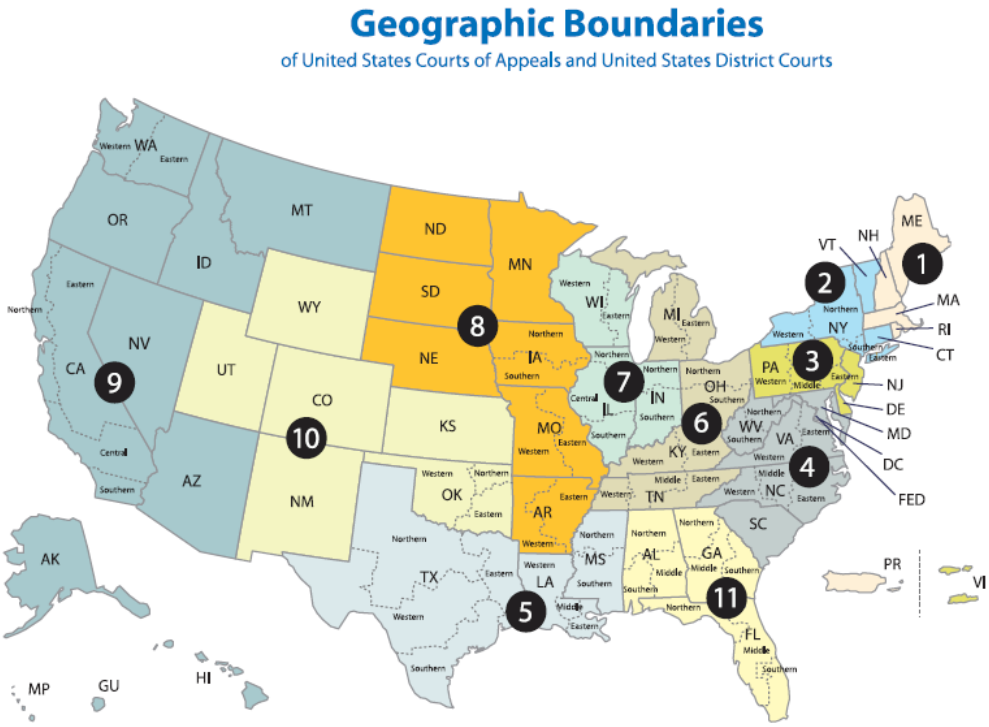
Table 1. Number of U.S. Courts of Appeal NEPA Opinions, by year and circuit

	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%**	

Figure 1. Map of U.S. Circuit Courts of Appeal



STATISTICS

Federal agencies prevailed in 79 percent (83 percent if the partial opinionsare included) of the substantive NEPA cases brought before the U.S. Courts of Appeal.

The Department of the Agriculture (U.S. Forest Service [USFS] and Agricultural Research Service/U.S. Sheep Experiment Station) and the Department of the Interior (Bureau of Land Management [BLM], National Park Service [NPS], Fish and Wildlife Service [FWS], and Bureau of Ocean Energy Management [BOEM]) were involved in eleven.[2] The Department of Transportation was involved in two cases. The Department of Defense (Department of the Navy) was involved in one case.

The Department of Agriculture prevailed in ten of its twelve cases; in one case it did not prevail, and in the other case it prevailed on one NEPA claim but not on the other NEPA claim. The Department of Interior prevailed in seven of its ten cases; in one case it did not prevail and in the other two cases (one of which it was co-defendant with the Department of Agriculture) it prevailed on one NEPA claim but not on the other NEPA claim. The Department of Defense and Department of Transportation prevailed in all of their cases.

Of the 24 substantive cases, six cases involved a categorical exclusion (CATEX), five involved environmental assessments (EA), nine involved environmental impact statements (EIS), and four cases involved federal actions for which there was no NEPA document.

Of the three cases in which agencies did not prevail, one involved a CATEX (*Envt'l Prot. Info. Ctr. v. Carlson*, 968 F.3d 985 (9th Cir. 2020)); one involved an EA (*Bark v. U.S. Forest Serv.*, 958 F.3d 865 (9th Cir. 2020)), and one involved the lack of a NEPA document (*Stand Up for California! v. U.S. Dep't of the Interior*, 959 F.3d 1154, (9th Cir. 2020)). The two cases in which the agencies only partially prevailed involved EISs (*High Country Conservation Advocates v. U.S. Forest Serv.*, 951 F.3d 1217 (10th Cir. 2020); *Center for Biological Diversity v. Bernhardt*, 982 F.3d 723 (9th Cir. 2020)). The agencies prevailed in the other 19 cases.

TRENDS

The following relates some trends and interesting conclusions from the substantive 2020 cases.

***Assessment of Impacts**:* Twenty[3] of the cases examined one or more challenges to assessment of impacts (including greenhouse gas impacts and cumulative impacts). The courts tended to focus on the deference afforded to the agency when they upheld the impact assessment analysis.

> ***Categorical Exclusion:*** Six cases scrutinized the application of CATEXs to projects based on the potential for impacts, including the consideration of extraordinary circumstances.

[2] The USFS was a co-defendant with the FWS and prevailed in that case; in another case, the USFS was a co-defendant with the BLM, where they prevailed on one NEPA claim but did not prevail on the other NEPA claim.

[3] Cases were only counted once even if the U.S. Court of Appeal adjudicated multiple claims involving impact assessment.

- *Wild Watershed v. Hurlocker*, 961 F.3d 1119 (10th Cir. 2020) (upholding the application of a statutory CATEX involving forest thinning projects and concluding, based on the text and structure of Healthy Forests Restoration Act (HFRA), that no extraordinary circumstances review was required prior to approval of the projects).

- *Envt'l Prot. Info. Ctr. v. Carlson*, 968 F.3d 985 (9th Cir. 2020) (disagreeing with the agency that an expansive project for removal of fire-damaged trees near roads in a national forest fell within the CATEX for "repair and maintenance" of roads).

- *Greater Hells Canyon Council v. Stein*, No. 18-35742, 796 Fed Appx. 396 (9th Cir. Jan. 9, 2020) (not for publication) (upholding, in a brief decision, the agency's use of a CATEX involving a fuels reduction project designed to restore forest health and reduce the risk of infestation and wildfire by thinning trees).

- *Native Ecosystems Council v. Marten*, No. 19-35084, 800 Fed. Appx. 543 (9th Cir. April 7, 2020) (not for publication) (discussing that the USFS considered the appropriate factors when determining whether to proceed with a CATEX for a non-commercial habitat enhancement project, including whether the cumulative effects and effects on inventoried roadless areas presented extraordinary circumstances that would preclude the application of a CATEX).

- *Native Ecosystems Council v. Erickson*, No. 18-35687, 804 Fed. Appx. 651 (9th Cir. Mar. 20, 2020) (not for publication) (agreeing that a CATEX applied if the project maximizes the retention of old-growth and large trees, as appropriate for the forest type, to the extent that the trees promote stands that are resilient to insects and disease).

- *Native Ecosystems Council v. Marten*, No. 18-36067, 807 Fed. Appx. 658 (9th Cir. April 7, 2020) (not for publication) (affirming, in a brief decision, the appropriate application of a CATEX involving the Moose Creek Vegetation Project in Montana's national forest).

Direct impacts*:* Eight cases considered challenges to assessment of direct impacts.

- *Friends of Animals v. Romero*, 948 F.3d 579 (2d Cir. 2020) (discussing that the NPS made a reasoned decision after years of discussion and study by numerous experts; the court held it was abundantly clear that NPS took a hard look at the environmental consequences of its plan.).

- *Bark v. U.S. Forest Serv.*, 958 F.3d 865 (9th Cir. 2020) (finding controversial impacts when commenters cited to a substantial body of scientific research involving the effect of variable density thinning on fire suppression, and the agency, in response, merely reiterated its previous conclusions).

- *American Wild Horse Campaign v. Bernhardt*, 963 F.3d 1001 (9th Cir 2020) (discussing that BLM made "reasonable predictions" about the relevant area of uncertainty; the court upheld BLM's reasonable predictions that a gelding and release plan will have insignificant effects on herd behavior).

- *Bair v. California Dep't of Transp.*, 982 F.3d 569 (9th Cir. 2020) (finding that the agency adequately considered the environmental effects of a U.S. Highway 101 improvement project through Richardson Grove State Park, a redwood forest in southern Humboldt County, California).

- *Native Ecosystems Council v. Erickson*, No. 18-35687, 804 Fed. Appx. 651 (9th Cir. Mar. 20, 2020) (not for publication) (opining the USFS appropriately evaluated the effects of an amendment, determining that it would not affect wildlife associated with old-growth forest and that it would likely cause an increase in old growth in the long term; the court held, even if old growth may vary from one timber compartment to the next, it was not arbitrary or capricious for the USFS to conclude that the new scale would not have a significant impact on the environment).

- *Conservation Congress v. U.S. Forest Serv*., No. 19-15753, 805 Fed. Appx. 520 (Mem) (9th Cir. May 18, 2020) (not for publication) (holding that the USFS adequately considered the impact of post-fire logging on private land in its EA; the USFS detailed the methodology used to quantify the impact of the Project, providing both the underlying data and illustrative maps).

- *Friends of Animals v. Silvey*, No. 18-17415, 820 Fed. Appx. 513 (9th Cir. Jul. 2, 2020) (not for publication) (stating BLM satisfied the "hard look" standard regarding the effects of releasing geldings back to the range because the EA provided a thorough review of the research on the gelding procedure and of studies on the effects of gelding on domesticated and semi-feral horses, on the effects of castration on other species, and on the natural social behavior of wild horses).

- *Cottonwood Envtl. Law Ctr. v. U.S. Sheep Experiment Station*, No. 19-35511, 827 Fed. Appx. 768 (Mem), 2020 WL 6305976 (Mem) (9th Cir. Oct. 28, 2020) (holding that the FEIS provided the public adequate access to information about the impact of sheep herding on grizzly bears and their interactions with humans).

Indirect Impacts: Two cases involved assessment of indirect impacts, and both weighed challenges to greenhouse gas impacts.

- *Center for Biological Diversity v. Bernhardt*, 982 F.3d 723 (9th Cir. 2020) (holding that the EIS "should have either given a quantitative estimate of the downstream greenhouse gas emissions" that will result from consuming oil abroad, or "explained more specifically why it could not have done so," and provided a more thorough discussion of how foreign oil consumption might change the carbon dioxide equivalents analysis.).

- *Natural Res. Def. Council v. Bernhardt,* No. 19-35006, 820 Fed. Appx. 520 (9th Cir. Jul. 9, 2020) (not for publication) (finding 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 recent lease sales were within the scope of actions considered in the 2012 EIS).

Cumulative impacts: Five cases considered the adequacy of the agency's cumulative effects assessment.

- *Bark v. U.S. Forest Serv*., 958 F.3d 865 (9th Cir. 2020) (discussing that the agency's cumulative impact analysis was insufficient because there was no meaningful analysis of any of the identified projects; the court found a lack of specific factual findings that would allow for informed decision-making).

- *Wild Watershed v. Hurlocker,* 961 F.3d 1119 (10th Cir. 2020) (finding that the USFS did not act arbitrarily or capriciously in failing to assess the cumulative effects of something that the record did not show to be either occurring or reasonably foreseeable; the record showed the agency assessed potential cumulative impacts in detail).

- *Tinian Women Ass'n v. U.S. Dep't of the Navy*, 976 F.3d 832 (9th Cir. 2020) (deferring the requirement for the U.S. Navy to address any cumulative impact in the Relocation EIS for the proposed range and training areas on Tinian and Pagan in the later joint military training Draft EIS/OEIS).

- *Rivers v. Bureau of Land Mgmt.*, No. 19-35384, 815 Fed. Appx. 107 (9th Cir. May 15, 2020) (not for publication) (rejecting the claim that BLM's cumulative effects assessment was inadequate; BLM considered the effects of reasonably foreseeable events on privately-owned land based on current management conditions and was not required to speculate about unspecified future actions.).

- *Chilkat Indian Village of Klukwan v. Bureau of Land Mgmt.*, No. 19-35424, 825 Fed. Appx. 425 (9th Cir. Aug. 28, 2020) (not for publication) (explaining that BLM did not act arbitrarily and capriciously by failing to consider the cumulative impacts of a future mine development on the Palmer Project as a reasonably foreseeable action because general plans for expanding mining do not require a cumulative effects analysis).

Alternatives Considered*:* Five cases involved challenges to the sufficiency of the alternatives considered:

- *Friends of Animals v. Romero*, 948 F.3d 579 (2d Cir. 2020) (finding the agency considered Friends of Animals' proposed alternative, which contained no mechanism to reduce the deer population, and determined it would not "partially or completely" meet the Plan's goals and, as a result, the agency was not obligated to consider it).

- *High Country Conservation Advocates v. U.S. Forest Serv.*, 951 F.3d 1217 (10th Cir. 2020) (holding that the USFS failed to provide a logically coherent explanation for its decision to eliminate the Pilot Knob Alternative for mine exploration activities; the alternative was not remote, speculative, or impractical or ineffective considering the agency's statutory mandate and the project goals, and it was significantly distinguishable from the alternatives already considered).

- *Center for Biological Diversity v. Bernhardt*, 982 F.3d 723 (9th Cir. 2020) (determining BOEM's alternatives analysis in the EIS was arbitrary and capricious because BOEM has the statutory authority to act on the emissions resulting from foreign oil consumption, which was not included in the EIS).

- *Conservation Congress v. U.S. Forest Serv*., No. 19-15753, 805 Fed. Appx. 520 (Mem) (9th Cir. May 18, 2020) (not for publication) (determining that the USFS did not err in refusing to adopt Conservation Congress' proposed alternative, which was to conduct no logging or felling within certain areas; the court found the inaction in those areas would conflict with the Project's objective of making existing roads safe for use).

- *Natural Res. Def. Council v. Bernhardt,* No. 19-35006, 820 Fed. Appx. 520 (9th Cir. Jul. 9, 2020) (not for publication) (discussing that because the 2012 EIS was the EIS for future lease sales, BLM's took a hard look at environmental consequences and reasonable alternatives in the 2012 EIS).

Federal Action: Four cases contemplated whether an agency should prepare an impact assessment (federal action).

- *General Land Office v. U.S. Dep't of the Interior*, 947 F.3d 309 (5th Cir. 2020) (stating that the FWS did not violate NEPA or its implementing regulations when it declined to delist the endangered Golden-cheeked Warbler without preparing an EA or EIS).

- *Stand Up for California! v. U.S. Dep't of the Interior*, 959 F.3d 1154, (9th Cir. 2020) (concluding that Indian Gaming Regulatory Act (IGRA) did not categorically bar application of NEPA because the two statutes (IGRA and NEPA) are not irreconcilable and do not displace each other; however, the Ninth Circuit remanded the case directing the district court to consider the NEPA threshold questions).

- *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).

- *Native Ecosystems Council v. Erickson*, No. 18-35687, 804 Fed. Appx. 651 (9th Cir. Mar. 20, 2020) (not for publication) (finding that the USFS was not required to prepare an EIS for the designation of landscape-scale areas because it did not "change

the status quo"; the USFS' designation of damaged areas of the forest did not trigger an obligation to prepare an EIS).

Supplementation: Three cases examined an agency's duty to supplement.

- *Native Ecosystems Council v. Erickson*, No. 18-35687, 804 Fed. Appx. 651 (9th Cir. Mar. 20, 2020) (not for publication) (discussing, in the dissent, that the USFS amended and substantially changed the old-growth measurement by changing the unit of measurement (from ten percent old-growth amount measured at a "timber compartment level" to a "mountain scale level"); the dissent found this was a significant change that warranted a supplemental statement to ensure that the affected species were not negatively impacted).

- *Natural Res. Def. Council v. Bernhardt,* No. 19-35006, 820 Fed. Appx. 520 (9th Cir. Jul. 9, 2020) (not for publication) (stating that the supplementation challenges failed because NRDC waived their claims by failing to preserve them; the court discussed that even if the claims were not waived, the supplementation claim was not appropriate -- the proper inquiry would have been whether BLM was required to prepare a tiered EA or EIS).

- *Bitterroot Ridge Runners Snowmobile Club v. U.S. Forest Serv.,* No. 18-35875, 833 Fed. Appx. 89, 2020 WL 6292628, (9th Cir. Oct. 27, 2020) (not for publication) (affirming that that no SEIS was required because the project change was a minor variation of the proposal in the DEIS).

Connected Actions: Two cases considered whether agencies segmented their activities or decisions.

- *Tinian Women Ass'n v. U.S. Dep't of the Navy*, 976 F.3d 832 (9th Cir. 2020) (concluding that the Marine relocation and the placing of training facilities on Tinian were not connected for the purposes of an EIS).

- *Chilkat Indian Village of Klukwan v. Bureau of Land Mgmt.*, No. 19-35424, 825 Fed. Appx. 425 (9th Cir. Aug. 28, 2020) (not for publication) (agreeing that BLM did not err by concluding that the development of a future mine was not a "connected action").

Each of the substantive 2020 NEPA cases, organized by federal agency, is summarized below. Unpublished cases are noted (11 of the 24 substantive cases in 2020 were unpublished, with all 11 cases from the Ninth Circuit). Although such cases may not have precedential value depending on the court, they can be of value to NEPA practitioners.

U.S. DEPARTMENT OF AGRICULTURE

High Country Conservation Advocates v. U.S. Forest Serv., 951 F.3d 1217 (10th Cir. 2020)
Agencies did not prevail on one NEPA claim but prevailed on second NEPA claim.

Issues: Alternatives, Remedy.

Facts: Environmental organizations (collectively, High Country) challenged 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. The Tenth Circuit vacated and remanded the lower court's grant of summary judgment for the agencies.

This appeal involves 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 Colorado Roadless Rule, which the Service adopted in 2012, prohibits road construction in designated areas but included an exception for the North Fork Coal Mining Area (the "North Fork Exception").

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. Mountain Coal operates the West Elk Mine, which is the only operating coal mine in the valley and is located in the Sunset Roadless Area. There is also an idled mine, the Elk Creek Mine, partially located in the Pilot Knob Roadless Area. Coal production at that mine ceased in 2013; as of 2015, its operator was focused on final reclamation work.

In prior litigation, a district court concluded that the agencies' decisions violated NEPA. Following these decisions, the USFS 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 USFS and BLM issued a Leasing SEIS and approved the requests.

High Country alleged that the agencies violated NEPA by unreasonably eliminating alternatives from detailed study in the North Fork SFEIS and the Leasing SFEIS. In response to a draft of the North Fork SFEIS, High Country submitted a comment 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. The groups stated that this alternative — the Pilot Knob Alternative — would protect 5000 acres, permit mining on 14,800 acres and make available 128 million short tons of coal while preserving a geographically and ecologically distinct roadless area. 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.

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.

Subsequently, the applicant, Mountain Coal 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. Approximately 1700 acres of the area at issue were within the Sunset Roadless Area and covered by the North Fork Exception.

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. With consent from the USFS, BLM approved the modifications.

Decision: High Country challenged the elimination from detailed study of the Pilot Knob Alternative in the North Fork SFEIS and the Methane Flaring Alternative in the Leasing SFEIS.

The Tenth Circuit, in the North Fork SFEIS challenge, considered whether the Pilot Knob Alternative was reasonably eliminated from detailed study using two guideposts: (1) the agency's statutory mandate and (2) the agency's objectives for a particular project. With respect to the first guidepost, the USFS' statutory mandate grants it "broad discretion to regulate the national forests, including for conservation purposes." 16 U.S.C. § 551. It similarly possesses the authority "to manage the national forests for 'multiple uses,' including 'outdoor recreation, range, timber, watershed, and wildlife and fish purposes.' " 16 U.S.C. § 528. The Tenth Circuit easily found that the Pilot Knob Alternative, which would preserve one roadless area and open two others for coal mining, falls within the USFS' statutory mandate.

The court examined the USFS' objectives for the particular project, the North Fork 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."

The Tenth Circuit found the Pilot Knob Alternative would appear to fit within the stated project goals: it provides for conservation in one roadless area and facilitates the development of coal resources in two others. However, the USFS dismissed this alternative from detailed consideration "because the Colorado Roadless Rule is considering access to coal resources within the North [Fork] Coal Mining Area over the long-term based on where recoverable coal resources might occur." Its explanation is based solely on the fact that the Pilot Knob Alternative would protect more land and provide access to fewer tons of coal than Alternative B (reinstating the entire North Fork Exception). But that factor is relevant to only one of the established objectives—providing for long-term coal-exploration and mining opportunities. It does not address the other objective—providing management direction for conserving roadless areas in Colorado.

This one-sided approach conflicts with the agency's obligation under NEPA to "provide legitimate consideration to alternatives that fall between the obvious extremes." *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1175 (10th Cir. 1999). Under this faulty logic, every alternative except Alternative B could have been eliminated from detailed study merely because it forecloses long-term coal mining opportunities. The Tenth Circuit found the USFS' rationale for eliminating the Pilot Knob Alternative was arbitrary. In considering the agency's stated objectives, the proffered explanation did not establish that the alternative was rejected as too remote, speculative, impractical, or ineffective.

Where the agency omits an alternative but fails to explain why that alternative is not reasonable, the EIS is inadequate. *Utahns for Better Transp. v. U.S. Dep't of Transp*., 305 F.3d 1152, 1166, 1170-71 (10th Cir. 2002), *as modified on reh'g*, 319 F.3d 1207 (10th Cir. 2003). In its briefs, 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." *Utahns for Better Transp.*, 305 F.3d at 1165. Because the North Fork SFEIS does not state that the Pilot Knob Alternative was eliminated from detailed study because of the existence of the Elk Creek Mine, the Tenth Circuit reject the agency's argument.

Likewise, the Tenth Circuit rejected the USFS' argument that the Pilot Knob Alternative is not significantly distinguishable from Alternative C. Alternative C would protect 7100 acres of wilderness, whereas the Pilot Knob Alternative would protect 4900 acres. That is, the Pilot Knob Alternative would protect 2100 fewer acres—nearly 30% less land. This 2100-acre difference represents more than 10% of the entire North Fork Coal Mining Area. The difference in accessible tons of coal is even greater. 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 Tenth Circuit found that the Pilot Knob Alternative was significantly distinguishable from Alternative C because it would affect entirely separate coal resources. The record indicated that if the North Fork Exception were reimplemented, mining would be less likely to occur in the areas protected under the Pilot Knob Alternative than in the areas protected under Alternative C. The Pilot Knob Alternative foreclosed mining on land adjacent to the idle Elk Creek Mine, which has not produced any coal since December 2013, and does not appear likely to resume production. In contrast, Alternative C would foreclose mining in the Flatirons and Sunset Roadless Areas adjacent to an active coal mine—the West Elk Mine. The operator of the West Elk Mine, moreover, has applied for lease modifications that would extend the mine into areas that would be protected under Alternative C. In short, the Pilot Knob Alternative would foreclose mining only if production at the Elk Creek Mine resumed, whereas Alternative C would foreclose expansion of coal leases already sought by the operator of the West Elk Mine.

The Tenth Circuit found the alternatives 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. "[L]ocation, not merely total surface disturbance, affects" environmental impacts and that "the location of development greatly influences the likelihood and extent of habitat preservation." *N.M. ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 706-707 (10th Cir. 2009). Of the three roadless areas, only the Pilot Knob Roadless Area contains a winter range for deer and bald eagles, a severe winter range for elk, and a historic and potential future habitat for the Gunnison sage-grouse. The Tenth Circuit concluded that the Pilot Knob Alternative and Alternative C were significantly distinguishable because they differ in acreage of protected land, amounts of recoverable coal, likelihood of coal mining activity, and environmental impacts.

In this case, the USFS failed to provide a logically coherent explanation for its decision to eliminate the Pilot Knob Alternative and was arbitrary and capricious. That alternative was not "remote, speculative, or impractical or ineffective" as judged against the USFS' statutory mandate and the project goals. And it was "significantly distinguishable from the alternatives already considered."

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." It provided two bases for the agencies' decision to eliminate the Methane Flaring Alternative from detailed study.

First, the USFS and BLM included a section on their elimination from detailed study of alternatives requiring Mountain Coal to use methane-mitigation measures. They noted that assessing any potential methane-mitigation measure requires "site-specific exploration data" and "resultant engineering

designs," which would be part of the mine-permitting process conducted by state agencies, OSM, and the federal Mine Safety and Health Administration (MSHA). And the agencies found that the effectiveness of portable methane flares in the lease modification area is uncertain because the effectiveness of a flare depends on a particular methane drainage well's gas composition, which was not available at the leasing stage.

The Leasing SFEIS explained that a separate approval was needed from MSHA, which occurs later in the mine-permitting process, is required for any flare-use proposal. It also noted that, at the time it was issued, MSHA had not approved any flaring operations at active coal mines. 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 USFS and BLM to eliminate the Methane Flaring Alternative from detailed study, and the agencies took a hard look at the Methane Flaring Alternative.

In sum, the Tenth Circuit held that the USFS violated NEPA by failing to study in detail in the North Fork EIS, specifically, the "Pilot Knob Alternative" proposed by High Country. With respect to the Leasing SFEIS, the Tenth Circuit held that NEPA did not require consideration of the "Methane Flaring Alternative" proposed by High Country.

The court stated the remedies available when reversing a district court decision and finding a violation of NEPA: 1) reversed and remanded without instructions, (2) reversed and remanded with instructions to vacate, and (3) vacated agency decisions. The typical remedy for an EIS in violation of NEPA is remand to the district court with instructions to vacate the agency action. *See, e.g., Diné Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831, 859 (10th Cir. 2019). Relying on case law, the court opined it may partially set aside a regulation if the invalid portion is severable, such as the Colorado Roadless Rule, which includes a severability clause The North Fork Exception is codified in the same subpart as the severability clause.

The Applicant requested the court and vacate the North Fork Exception only as applied to the Pilot Knob Roadless Area. The court found there was no provision in the Rule that relates only to the Pilot Knob Roadless Area. The court concluded that the portion of the North Fork Exception applying to the Pilot Knob Roadless Area was not severable from the remainder of the exception because it does not operate independently.

Moreover, the North Fork SFEIS dealt with the North Fork Coal Mining Area as a whole, rather than only with the Pilot Knob Roadless Area. The court found the appropriate remedy is vacatur of the entire North Fork Exception.

Concurring in part and dissenting in part (Circuit Judge Kelly). Judge Kelly concurred that the court's decision that NEPA did not require consideration of the methane flaring alternative but respectfully dissented from the conclusion that USFS was required to consider the Pilot Knob alternative in detail. The USFS considered three alternatives in detail and eliminated 12 others from such consideration, including the Pilot Knob alternative. Those three alternatives, Alternatives A, B, and C, represented a reasonable range of acreage available for mining, within which the Pilot Knob alternative fell. The categorical prohibition on access to coal in Pilot Knob, given "the State's interest in not foreclosing opportunities for exploration and development of coal resources," was a sufficient reason for not considering it in greater detail and citing *Dombeck*, stated that this was not a case where the objectives could only be satisfied by one alternative. *Utahns for Better Transp. v. U.S. Dep't of Transp*., 305 F.3d 1152, 1166 (10th Cir. 2002) (*quoting* 40 C.F.R. § 1502.14(a)).

The dissent criticized the majority's finding that the rejection "is based solely on the fact that the Pilot Knob Alternative would protect more land and provide access to fewer tons of coal than Alternative B (reinstating the entire North Fork Exception)," which it argued was a rationale that could be applied to every other alternative. The court also concluded that because the rejection did not mention the Elk Creek Mine (which is within Pilot Knob), the argument that Alternative C did not foreclose future access to existing federal coal or private leases constituted a post-hoc rationalization.

Both the Pilot Knob alternative (5,000 acres) and Alternative C (7,100 acres) removed acreage from coal development in order to preserve certain roadless areas. On this record, Judge Kelly disagreed with the court's conclusion that the agency engaged in a "post-hoc rationalization" regarding the Elk Creek Mine. The agency clearly articulated that it excluded the Pilot Knob alternative because it failed to

"preserve[ ] the option of future coal exploration and coal-related surface activities." Judge Kelly believed that standard was met and that the majority distorted the administrative record by ignoring obviously relevant facts that were considered but not expressly mentioned in an agency's brief discussion of its reasons for eliminating an alternative.

The court is correct that it cannot sustain the agency's decision on the ground that the Pilot Knob alternative was not "significantly distinguishable" from Alternative C. The agency did not advance this reason for elimination in its SFEIS and we must affirm, "if at all, on grounds articulated by the agency itself." *Utahns for Better Transp*., 305 F.3d at 1165. Judge Kelly criticized the majority's acceptance of High Country's assertion that the two alternatives would results in significantly different environmental impacts – Judge Kelly did not find the Pilot Knob alternative distinguishable and found that record supported this fining (i.e. cited ecological features exists in other areas of state not just other areas under consideration). Judge Kelly further criticized the majority for using catchwords in its opinion such as "30% less land protected," "35% more coal made accessible," and "dissimilar habitat features" for what makes an alternative sufficiently distinguishable. Judge Kelly stated "[t]he court's opinion may provide a roadmap for delaying federal action rather than promoting informed decision-making through careful consideration of reasonable alternatives. Perhaps some other case may necessitate such line-drawing, but this is not it."

This court's role under NEPA is not to "substitute our judgment" about what alternatives are most effective to achieve an action's purpose, but only to determine whether the necessary procedures have been followed. Judge Kelly stated that the agency met its mandate here by considering a reasonable range of alternatives and "briefly discuss[ing]" its reasons for eliminating others from detailed analysis. 40 C.F.R. § 1502.14(a); *see also* 42 U.S.C. § 4332(C).

Bark v. U.S. Forest Serv., 958 F.3d 865 (9th Cir. 2020)
Agency did not prevail.

Issues: Significance of Impacts (controversy, cumulative effects).

Facts: Conservation organizations (collectively, Bark) challenged the USFS forest management project and timber sale, the Crystal Clear Restoration project (CCR) (collectively, the Project), 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.

The CCR Project is a forest management effort and timber sale affecting 11,742 acres in Mt. Hood National Forest. The Project area is partly a moist "transition" climate, and partly a dry "eastside" climate. 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." The agency planned to achieve these goals in part using a technique called "variable density thinning." This process gives the agency flexibility in choosing which trees to cut, thereby allowing the USFS to create variation within an area of forest so that the stands "mimic more natural structural stand diversity." The agency plans to leave an average canopy cover of 35–60%, with a minimum of 30% where the forest is more than 20 years old. After conducting an EA, the USFS determined the CCR project had no significant impacts, and issued a FONSI.

Decision: Bark claimed the USFS did not undertake a proper analysis of the significant impacts of the Project or of alternatives to the Project. 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"). 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.

"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).

The EA explained that the CCR Project will use "variable density thinning" throughout the Project area to address wildfire concerns. "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."

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 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.

Oregon Wild pointed out in its EA comments that fuel reduction does not necessarily suppress fire. Indeed, it asserted that "[s]ome fuel can actually help reduce fire, such as deciduous hardwoods that act as heat sinks (under some conditions), and dense canopy fuels that keep the forest cool and moist and help suppress the growth of surface and ladder fuels . . . " Oregon Wild cited more than ten expert sources supporting this view. Importantly, even the Fuels Specialist Report produced by the USFS itself noted that "reducing canopy cover can also have the effect of increasing [a fire's rate of spread] by allowing solar radiation to dry surface fuels, allowing finer fuels to grow on . . . the forest floor, and reducing the impact of sheltering from wind the canopy provides."
The effects analysis in the EA did not engage with the considerable contrary scientific and expert opinion; it instead drew general conclusions such as that "[t]here are no negative effects to fuels from the Proposed Action treatments."

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. *See Blue Mountains Diversity Project v. Blackwood*, 161 F.3d 1208, 1213 (9th Cir. 1998) (holding that conflicting evidence on the effects of ecological intervention in post-fire landscapes made a proposed project highly uncertain, thus requiring an EIS).

The court also found that the USFS also failed to identify and meaningfully consider cumulative impacts. *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 868 (9th Cir. 2005) (discussing that the cumulative analysis "must be more than perfunctory; it must provide a useful analysis of the cumulative impacts of past, present, and future projects."). The Ninth Circuit stated that cumulative impact analyses were insufficient when they "discusse[d] only the direct effects of the project at issue on [a small area]" and merely "contemplated" other projects but had "no quantified assessment" of their combined impacts. *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt*., 387 F.3d 989, 994 (9th Cir. 2004).

The EA ostensibly analyzed the cumulative effects of the CCR Project, and included a table of other projects that were "considered in the cumulative effects analyses." The cumulative impact analysis was insufficient because there is no meaningful analysis of any of the identified projects. The table gave no information about any of the projects listed; it merely named them. The section of the EA actually analyzing the cumulative effects on vegetation resources did not refer to any of these other projects. Nor are there

any specific factual findings that would allow for informed decision-making. The EA simply concluded that "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." These are the kind of conclusory statements, based on vague and uncertain analysis, that are insufficient to satisfy NEPA's requirements.

The EA mentioned the possibility of cumulative effects in sections on other specific sub-topics such as fuels management, transportation resources, and soil productivity. These sections similarly relied on conclusory assertions that the Project has "no cumulative effects." When the EA did acknowledge the possibility of the Project's impact, such as in the section that analyzed the Project's effects on spotted owls, it noted only that "[t]imber harvest on federal, tribal, and private land, and utility corridor operations have reduced the amount of suitable habitat . . . on the landscape and could continue to do so in the future," without attempting to quantify the cumulative loss or naming other projects. Yet there were other relevant timber projects to discuss.

Bark pointed out at least three other recent or future timber projects in their comments responding to the EA, but the relevant section of the document limited its analysis to only the Project area and a 1.2-mile buffer surrounding it. Such a small buffer zone fails to distinguish the EA's cumulative impact analysis from an analysis of the direct effects of the Project. The USFS failure to engage with the other projects identified by Bark left open the possibility that several small forest management actions will together result in a loss of suitable owl habitat. Overall, the Ninth Circuit found that there was nothing in the EA that could constitute "quantified or detailed information" about the cumulative effects of the Project. Therefore, this factor required the USFS to conduct an EIS. *See* 40 C.F.R. § 1508.27(b)(7).

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

Issues: Categorical Exclusion (Extraordinary Circumstances, Cumulative Impacts)

Facts: Environmental organizations and others (collectively, Wild Watershed) challenged the USFS implementation of two forest thinning projects in Santa Fe National Forest. The Tenth Circuit affirmed the lower court's dismissal in favor of the agency.

The Healthy Forests Restoration Act (HFRA) was originally enacted in 2003 "to reduce wildfire risk to communities, municipal water supplies, and other at-risk Federal land through a collaborative process of planning, prioritizing, and implementing hazardous fuel reduction projects." 16 U.S.C. § 6501(1). In 2014, Congress amended HFRA, establishing the statutory categorical exclusion at issue here—the Insect and Disease exclusion. See 16 U.S.C. § 6591b. This categorical exclusion authorizes "priority projects" to protect forests from insect infestations and disease. See 16 U.S.C. § 6591a–b. It contemplates a two-step process for approving such projects. The USFS must first designate certain "landscape-scale areas" part of an insect and disease treatment program. 16 U.S.C. § 6591a. Then, the USFS may carry out projects within those areas provided they meet the statutory criteria. Id. § 6591b.

To qualify, a project must (1) meet certain limitations related to the building of new roads, location, and size, excluding projects of more than 3,000 acres; (2) "maximize[ ] the retention of old-growth and large trees, as appropriate for the forest type, to the extent that the trees promote stands that are resilient to insects and disease;" (3) "consider[ ] the best available scientific information to maintain or restore the ecological integrity;" (4) be "developed and implemented through a collaborative process;" (5) "be consistent with the land and resource management plan" for the area; and (6) involve "public notice and scoping." 16 U.S.C. § 6591b. Where such requirements are met, HFRA provides that the project "may be . . . considered an action categorically excluded from the requirements of [NEPA]." Id. § 6591b(a)(1).

The USFS approved the Hyde Park Wildland Urban Interface Project and the Pacheco Canyon Forest Resiliency Project—pursuant to the authority granted by the Insect and Disease exclusion. 16 U.S.C. § 6591b. The Hyde Park project covers 1,840 acres approximately ten miles northeast of Santa Fe. The Pacheco Canyon project covers 2,042 acres three miles farther north.

The forest in each project area comprises mostly ponderosa pine with some Douglas fir, pinon juniper, and mixed conifer stands. Due in part to years of fire suppression, the trees in the project areas have grown unnaturally dense. Specifically, young and smaller trees make up a high percentage of the forest. Because of this density, many of the small trees cannot access sufficient water and sunlight. This stunts the trees and renders them vulnerable to insect and disease outbreaks. The combination of dense growth and disease risk has made the forest susceptible to a particularly intense type of fire—a crown fire—which not only burns through the understory as a lower intensity fire might, but also reaches the larger trees in the overstory.

Due to these risks, the USFS proposed thinning the forest and applying prescribed burns in the project areas to "combat insect and disease, restore natural fire regimes, improve wildlife habitat, and reduce the risk of uncharacteristic fire effects."

For both projects, considerable acreage is located within various inventoried roadless areas. But no new roads would be needed to complete either project, and the USFS has not planned any new road construction in association with these projects.

Both projects are part of a larger initiative in the Santa Fe region conducted by the Greater Santa Fe Fireshed Coalition. On February 14, 2017, the USFS issued a single scoping letter covering both projects. After comments were received, the USFS approved the Hyde Park and Pacheco Canyon projects through decision memos issued on March 21, 2018 and June 1, 2018 respectively.

Wild Watershed argued an EIS was required under NEPA for the larger goal of treating the Fireshed and the less-extensive review conducted by the USFS failed to adequately consider the projects' effects on inventoried roadless areas and their cumulative impacts on the environment.

Decision: The USFS contended it is exempt from NEPA's requirements. Wild Watershed disagreed and argued that when Congress enacted the Insect and Disease exclusion it did not exempt those types of projects wholesale from NEPA. It focused on two NEPA requirements: the obligation to (1) perform extraordinary circumstances review, and (2) consider the potential cumulative impacts of the projects.

1. Extraordinary Circumstances Review

Wild Watershed contended the extraordinary circumstances review requirement stemmed from the statutory text of the Insect and Disease exclusion, which states a project "may be . . . categorically excluded" from the requirements of NEPA. 16 U.S.C. § 6591b(a). To Wild Watershed, use of the "categorically excluded" language signifies Congress's intent to incorporate the regulatory definition of "categorical exclusion" and "all that term entails" into the statutory provision.

The Tenth Circuit examined the USFS's handbook and a Frequently Asked Questions (FAQs) document, and not finding that clear, found that the text of the statute, the Insect and Disease exclusion omits any explicit requirement to perform extraordinary circumstances review. *See* 16 U.S.C. § 6591b. Where no explicit statutory requirements exist, the court generally refrain from reading any in. *Dean v. United States*, 556 U.S. 568, 572, 129 S.Ct. 1849, 173 L.Ed.2d 785 (2009); *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 93 (2012).

In contrast, the court reviewed the CATEXs in the Healthy Forests Restoration Act and found that Congress mandated extraordinary circumstances review for certain projects, like silviculture. 16 U.S.C. § 6554(d)(1) (providing that projects "carried out under this section . . . may be categorically excluded from documentation in an EIS and EA under [NEPA]"). Yet, unlike in the Insect and Disease exclusion, Congress explicitly mandated that applied silvicultural assessment projects "be subject to the extraordinary circumstances procedures established by the [USFS]." *Id.* § 6554(d)(2)(B). Similarly, the court found the same regarding the CATEXs for Wildfire Resilience Projects in another provision of HFRA, Congress created a statutory categorical exclusion for wildfire resilience projects. *See* 16 U.S.C. § 6591d (establishing the Wildfire Resilience exclusion).

The Tenth Circuit found that Congress did not use the "categorically excluded" language as a term of art necessarily incorporating a requirement to perform extraordinary circumstances review. *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296 (1983). Where Congress intended extraordinary circumstances review to be required before an agency may rely on a statutory categorical exclusion, it says so explicitly. *See, e.g.,* 16 U.S.C. § 6591d(c)(4).

The absence of an explicit extraordinary circumstances review requirement in the Insect and Disease exclusion led the court to conclude that no such requirement exists under the statute. Every court that has squarely addressed this question reached the same conclusion. *See, e.g., Native Ecosystem Council v. Marten*, CV 17-153-M-DWM, 2018 WL 6046472, at *5 (D. Mont. Nov. 19, 2018)*; Greater Hells Canyon Council v. Stein,* No. 2:17-cv-00843, 2018 WL 3966289, at *8 (D. Or. June 11, 2018) (Sullivan, Magistrate J., proposing findings of fact and recommendations), *adopted by* 2018 WL 3964801, at *1 (D. Or. Aug. 17, 2018).

The Tenth Circuit found that although the USFS guidance documents presented some evidence in favor of Wild Watershed's interpretation, the court found this insufficient to overcome the conclusion based on the text and structure of HFRA that no extraordinary circumstances review was required prior to approving the projects. Thus, the court did not address the sufficiency of any extraordinary circumstances conducted by the USFS.

2. Consideration of Cumulative Impacts

In approving the projects, the USFS considered certain potential cumulative impacts in detail. For example, it considered the potential cumulative effects of the expected subsequent treatments in the project areas on sensitive species. It also considered the potential cumulative effects of thinning in multiple areas within the Fireshed on management indicator species and threatened and endangered species. In each instance, it found no adverse cumulative effects.

Wild Watershed asserted that the USFS was required to consider a separate type of cumulative impact, namely "the dramatic effects of extensive thinning and . . . burning" on 21,896 acres of USFS land within the Fireshed. Specifically, Wild Watershed sought an assessment of the effects of thinning and burning on roadless areas and old growth habitat. To support its contention that such extensive thinning and burning is, in fact, occurring or reasonably foreseeable, Wild Watershed points to the Coalition's meeting minutes and a map depicting certain "ongoing or planned" projects within the Fireshed.

The court disagreed, finding that the agency was not required to assess the cumulative effects of something that the record does not show to be either occurring or reasonably foreseeable. The map Wild Watershed relied on depicts certain projects in the Fireshed and suggested that these are planned or ongoing. These projects did cover 21,896 acres, but, critically, the map did not convey the substance of the projects, that these were thinning and burning projects. Wild Watershed failed to show the alleged 21,896 acres worth of projects it cites to necessarily warranted consideration for having "a significant cause-and-effect relationship with the direct and indirect effects of the [Hyde Park and Pacheco Canyon projects]."

USFS statements undercut Wild Watershed's argument. The forest official responsible for approving the projects declared that, at the time of the Hyde Park and Pacheco Canyon projects were approved, the USFS lacked "a defined proposal for work across the remaining National Forest System lands within the Fireshed" as for treating those areas, and the funding to accomplish implementation ha[d] yet to be determined."). Thus, the potential cumulative impacts of the Hyde Park and Pacheco Canyon projects were not considered in conjunction with these other "speculative" components of the larger Coalition initiative. Wild Watershed failed to show the projects may be set aside due to any NEPA violation.

Envt'l Prot. Info. Ctr. v. Carlson, 968 F.3d 985 (9th Cir. 2020)
Agency did not prevail.

Issues: Categorical Exclusion, Preliminary Injunction.

Facts: An environmental organization, Environmental Protection Information Center (EPIC) challenged the USFS' determination that a project for removal of fire-damaged trees near roads in national forest fell within a CATEX for road repair and maintenance. The lower court originally denied plaintiff's motion for injunctive relief finding for the agency. The Ninth Circuit reversed and remanded.

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 USFS approved the Ranch Fire Roadside Hazard Tree Project (the Project). The Project authorized the USFS 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. Rather

than preparing an EA or an EIS for the Project, the USFS relied on a CATEX for road repair and maintenance in 36 C.F.R. § 220.6(d)(4). EPIC challenged the USFS action, and contended that the Project did not qualify for the CATEX.

Decision: According to Ann D. Carlson, Forest Supervisor for the Mendocino National Forest, "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."

The vegetation in the burned area of the Mendocino National Forest comprises a variety of forest types, including mixed conifer, oak woodlands, pine, and Douglas fir. A logging company whose bid has been accepted may fell "merchantable hazard trees" of fourteen or more inches diameter at breast height that are "within one and a half tree-heights" of the road. Any tree within 200 feet of the centerline of the road that has been partially burned and has a 50 percent or higher probability of mortality is eligible for felling. For "the roads that run adjacent to the Snow Mountain Wilderness," the Project allows cutting of eligible trees within 100, rather than 200, feet of the centerline. In total, the Project authorized the logging of millions of board feet of timber on nearly 4,700 acres of National Forest land.

Anthony Saba, a forester/silviculturist employed by the USFS, stated in a declaration that merchantable trees in the Project areas range from 60 to 185 feet in height. According to Saba, in one area of the Project, the average tree height was 100 feet; in another, the average height was 111 feet. Under the criteria of the Project, a logging company may cut a 100-foot tree located as far as 150 feet from the road, or a 111-foot tree located as far as 166 feet from the road. At the outer limit of the Project area, a company may cut even taller trees. If a 100-foot tree located 150 feet from the road were to fall directly toward the road at a 90-degree angle, the tip of the tree would come to the ground 50 feet from the road. If a 111-foot tree located 165 feet from the road were to fall in the same manner, its tip would come to the ground 54 feet from the road. If the trees were to fall at any other angle, their tips would come to the ground at greater distances from the centerline.

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. The USFS relied on the first CATEX.

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).

Neither a "case file and decision memo" nor a "supporting record" is required in order to invoke the CATEX under § 220.6(d)(4).

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).

A "case file and decision memo" and a "supporting record" are required to invoke the CATEX under § 220.6(e)(13).

With respect to the Project at issue, the CATEX for road repair and maintenance is unambiguous. The CATEX applies to "repair and maintenance of roads, trails, and landline boundaries." "Repair" and "maintenance" are common words with well-understood ordinary meanings. To ensure that these

words are understood in accordance with their ordinary meanings rather than as terms of art, the CATEX provides examples: "Repair and maintenance" of roads include "grad[ing], resurfac[ing], and clean[ing] the culverts" of a road; "grading a road"; "clearing the roadside of brush without the use of herbicides"; and "resurfacing a road to its original condition." 36 C.F.R. § 220.6(d)(4)(i)–(iii). The CATEX specified that the "repair and maintenance" are not limited to these examples, but the clear inference (even without invoking the principle of ejusdem generis), is that other examples should be similar in character to the examples provided.

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). In her declaration in the district court seeking to justify the "repair and maintenance" CATEX, Forest Supervisor Carlson repeatedly referred to all the trees to be felled under the Project as "hazard trees." 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. But the Project allowed the felling of many more trees than that. 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 USFS roads.

EPIC argued that the CATEX for salvage logging, 36 C.F.R. § 200.6(e)(13), is the only potentially applicable CE for salvage logging of fire-damaged trees. According to EPIC, no project that allows salvage logging over an area that exceeds 250 acres is eligible for a CATEX. At an earlier time, when the salvage logging CATEX was first adopted, the USFS may have agreed with this position, as EPIC contended. The current position of the USFS is that the CATEXs for road repair and maintenance and for salvage logging overlap. That is, in the view of the USFS, if a project that allows felling of dangerous trees near roads comes within the CATEX for repair and maintenance, that CATEX is available even if the total area of the project is greater than 250 acres.

The Project at issue provides substantial revenue to the USFS. It allowed for logging of commercially valuable trees up to 200 feet on either side of the road; felling of partially burned trees that had a 50 percent or higher chance of mortality; felling of large trees at such distances from the road that their tips will be 50 or more feet from the road even if the tree falls directly toward the road; and allowed logging over an area of approximately 4,700 acres. Under no reasonable interpretation of its language does the Project come within the CATEX for "repair and maintenance" of roads.[4]

The Ninth Circuit reversed the district court's denial of the requested preliminary injunction and remanded for further proceedings.

Dissent (Circuit Judge Lee): Circuit Judge Lee stated that the Project may not be optimally designed for the reasons outlined by the majority. But big problems often require big and imperfect solutions. Judge Lees would not second-guess an imperfect plan fashioned by the USFS, even if the courts could have crafted a better tailored one.

Judge Lee reviewed the facts and found the Ranch Fire burned nearly 410,000 acres of land, earning its title as the largest wildfire in California's history. About 288,000 acres of the burned area is in the Mendocino National Forest. Over 770 miles of public roads that allow visitors to access the Forest for recreation and respite are now threatened by charred trees, some of which tower over the landscape up to 185 feet in height. If these trees fell on public roads,

[4] This case reviewed, in detail, a request for a preliminary injunction; this paper's discussion focuses only on the substantive aspects of the NEPA analysis (in this case a CATEX) rather than an analysis of the remedy.

the lives of visitors, first responders, and USFS personnel would be placed in grave danger.

He found the USFS 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. Eligible trees must be large, able to strike the road, and at least halfway dead. According to the declaration of Mendocino National Forest Supervisor Ann Carlson, timber sales are the primary means to fell thousands of hazardous trees because it is "highly unlikely" that the USFS "could obtain sufficient appropriated funds [from Congress] to accomplish all project activities." The USFS estimated that the cost to the agency would be about $5.5 million otherwise. Judge Lee would affirm this plausible plan.

Greater Hells Canyon Council v. Stein, No. 18-35742, 796 Fed Appx. 396 (9th Cir. Jan. 9, 2020) (not for publication)
Agency prevailed.

Issues: Administrative Record (Categorical Exclusion)

Facts: Greater Hells Canyon Council challenged the USFS' approval of the Lostine Public Safety Project, a fuels reduction project designed to restore forest health and reduce the risk of infestation and wildfire by thinning trees along the Lostine River in the Wallowa-Whitman National Forest in Oregon. The lower court granted summary judgment for the agency, involving the application of a CATEX, which is detailed in *Greater Hells Canyon Council v. Stein*, No. 2:17-cv-00843-SU, 2018 WL 3966289 (D. Ore. Jun. 11, 2018) (not for publication). The Ninth Circuit affirmed the lower court's grant of summary judgment in favor of the agency.

Decision: The Ninth Circuit affirmed the district court's rejection of the Council's request to admit the extra-record declaration of Veronica Warnock, its conservation director. Courts reviewing an agency decision are limited to the administrative record, subject to narrow exceptions. *Lands Council v. Powell*, 395 F.3d 1019, 1029–30 (9th Cir. 2005). "[D]istrict courts are permitted to admit extra-record evidence: (1) if admission is necessary to determine 'whether the agency has considered all relevant factors and has explained its decision,' (2) if 'the agency has relied on documents not in the record,' (3) 'when supplementing the record is necessary to explain technical terms or complex subject matter,' or (4) 'when plaintiffs make a showing of agency bad faith.' " *Id.* at 1030.

The Ninth Circuit held that the lower court did not abuse its discretion in excluding the declaration because the declaration did not fill any holes in the administrative record, which contained extensive evidence about the USFS's decision-making and collaborative processes, nor did it fall under any other exception

Native Ecosystems Council v. Marten, No. 19-35084, 800 Fed. Appx. 543 (9th Cir. April 7, 2020) (not for publication)
Agency prevailed.

Issues: Use of Analytic Framework, Categorical Exclusion, Tiering

Facts: Environmental organizations (collectively, NEC) challenged an agency's approval of the Johnny Crow Wildlife Habitat Improvement project, a non-commercial habitat enhancement project in the Elkhorn Wildlife Management Unit of the Helena-Lewis and Clark National Forest. In a limited opinion, the Ninth Circuit affirmed the lower court grant of summary judgment in favor of the agency.

Decision: The Ninth Circuit rejected NEC's claim that USFS' decision to use ecosystem management as an analytical framework violates NEPA. NEC's claim "seek[s] wholesale improvement" of an internal decision-making process. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891, 110 S.Ct. 3177 (1990). The USFS' decision to use a particular analytical framework is not a discrete "agency action" and cannot be challenged under the APA. *See* 5 U.S.C. § 551(13); *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 65, 124 S.Ct. 2373, (2004) ("[W]hen an agency is compelled by law to act . . . but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be.").

NEC claimed that that the USFS' decision to adopt a CATEX and its alleged tiering to a 1993 Landscape Analysis was a violation of NEPA. The Ninth Circuit found the claims meritless - - that the USFS considered the appropriate factors when determining

whether to proceed with a CATEX, including whether the cumulative effects and effects on inventoried roadless areas presented extraordinary circumstances precluding application of the CATEX. The Ninth Circuit did not find any evidence in the record that the USFS unlawfully tiered their analysis.

The lower court opinion fully analyzed these issues in detail in *Native Ecosystems Council v. Marten*, CV 17-77-M-DLC, 2018 WL 6480709 (D. Mont. Dec. 10, 2019) (not reported), and the Ninth Circuit affirmed its decision.

Native Ecosystems Council v. Erickson, No. 18-35687, 804 Fed. Appx. 651 (9th Cir. Mar. 20, 2020) (not for publication)
Agencies' prevailed.

Issues: Administrative Record, Federal Action, Categorical Exclusion, Impact Assessment, Supplementation

Facts: Environmental groups (NEC) challenged the agencies' (the USFS and the FWS) designation of approximately five million acres in Montana as threatened landscapes (no document), approval of a forest health project (CATEX) and approval of a cleanup amendment to a national forest plan (EA). The Ninth Circuit affirmed the lower court's grant of summary judgment in favor of the agencies.

Decision: The Ninth Circuit agreed with the lower court's opinion when it declined to expand the administrative record with additional materials, including an overlay map, because the groups did not satisfy any of the "four narrowly construed circumstances" that would allow expansion of the administrative record. *See Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010).

The USFS was not required to prepare an EIS for the designation of landscape-scale areas. Under NEPA, a federal agency need not prepare an EIS when the proposed federal action does not "change the status quo." *Ctr. for Biological Diversity v. Ilano*, 928 F.3d 774, 780 (9th Cir. 2019) (holding that the designation of landscape-scale areas did not change the status quo). The USFS' designation of damaged areas of the forest did not trigger an obligation to prepare an EIS. *See id*. at 780–81.

The Ninth Circuit held that the USFS' decision to apply a CATEX for the Smith Shields Project (Project) was not arbitrary or capricious. An agency may issue a CATEX for a project approved under the Healthy Forests Restoration Act (HFRA) in certain circumstances. *See id.* at 782 (citing 16 U.S.C. § 6591b(a)). The CATEX applies if, among other requirements, the project "maximizes the retention of old-growth and large trees, as appropriate for the forest type, to the extent that the trees promote stands that are resilient to insects and disease." 16 U.S.C. § 6591b(b)(1)(A). In this case, the USFS concluded, based on scientific research and analysis by its experts, that no old growth would be removed in conjunction with the Project. An agency must have discretion to rely upon the reasonable opinions of its own qualified experts. *See Ilano*, 928 F.3d at 783. Accordingly, the Ninth Circuit opined that the USFS's application of the CATEX was appropriate.

The USFS' decision to not prepare an EIS for the "Clean Up Amendments" to the Forest Plan regarding old-growth forest and elk hiding cover was not arbitrary or capricious. The court considered the old-growth standard, noting that the original and amended standards both require the USFS to strive to maintain 10% old-growth forest. But the amendment altered the scale over which that percentage must be achieved, moving from the "timber compartment" to the "mountain range" scale. NEC argued that the USFS' FONSI regarding the old-growth amendment was arbitrary and capricious.

In evaluating the amendment, the USFS explained that the larger scale would yield more reliable data and was more consistent with the Forest Plan's original goal of achieving habitat diversity across the landscape. The USFS also evaluated the effects of the amendment, determining that it would not affect wildlife associated with old-growth forest and also that it would likely cause an increase in old growth in the long term. Given these determinations, even if old growth may vary from one timber compartment to the next, the court found it was not arbitrary or capricious for the USFS to conclude that the new scale would not have a significant impact on the environment.

The court rejected NEC's claim that the 10% old-growth requirement, which now applies to "lands classified as forested," previously applied to a larger area. Logically, the USFS can "strive to maintain" old growth only where it exists. Accordingly, the previous standard's requirement of maintaining 10% old-growth cover in timber compartments "containing

suitable timber" necessarily applied to forested areas. The court disagreed with the claims that the USFS, in amending the indicator-species standard, removed the only two indicator species for old-growth forest (i.e., northern goshawk and pine marten). Northern goshawk and pine marten continue to be indicators for "mature forest," a category that includes old-growth forest. The court considered the elk hiding-cover standard, where the original and amended standards both require the USFS to maintain at least two thirds of hiding cover. The amendment again altered the denominator. Instead of maintaining two thirds of the "hiding cover associated with key habitat components," the USFS must now maintain two thirds of specific tree species "on National Forest System lands" and "with at least 40% canopy cover."

NEC challenged these changes as unsupported by the best available science, a requirement under the National Forest Management Act, NFMA. 36 C.F.R. § 219.3. But in evaluating the hiding-cover amendment, the USFS considered a collaborative report prepared with the Montana Department of Fish, Wildlife, and Parks in 2013, which included a significant review of research on elk security. These findings supported the hiding-cover amendments, and the court gave the USFS deference in making the determination.

NEC argued the USFS' FONSI regarding the hiding-cover amendments was arbitrary and capricious because the two-thirds requirement previously applied to the total area of the relevant landscape, but the pre-amendment standard contained no such language. Instead, the requirement was to maintain two thirds of the "hiding cover associated with key habitat components," and the standard listed examples of such key habitats and explained they would be "mapped on a site-by-site basis."

NEC similarly claimed the two-thirds requirement previously applied to all forested areas and not just those on the National Forest lands. But again, the old standard contained no such language and was tied to maintaining key habitat components where they already existed. They claimed that the amendment reduces hiding-cover protection by now applying to only some tree species. But the USFS named those species simply to point out trees "naturally capable" of providing sufficient cover. The Ninth Circuit found the amended standard was more precise but not less protective. It rejected the NEC's claims and affirmed the lower court's decision.

Dissent (Circuit Judge Rawlinson): Judge Rawlinson affirmed in part and dissented in part. He found that the Forest Plan amendments addressing old-growth and elk-hiding cover triggered the requirement for a Supplemental EIS. In analyzing the issue, USFS amended and substantially changed the old-growth measurement by changing the unit of measurement (from ten percent old-growth amount measured at a "timber compartment level" to a "mountain scale level."). The effect of the change was to allow the agency to declare that it had complied with the old growth standard if it could point to ten percent over-growth anywhere on the mountain range, even if the standard not met in the timber compartment area being affected by a particular project. Thus, this was a significant change that warranted a supplement statement to ensure that the affected species were not negatively impacted.

Judge Rawlinson found the same as true for the amendments to the elk-hiding cover standard. It substantially modified the standard of measurement without adequately exploring the effect of the newly adopted standard on the available elk-hiding cover.

Forest Plan Standard 6(a)(5):	Amended Standard 6(a)(5):
Maintain at least two-thirds of the hiding cover associated with key habitat components over time. . . . Key habitat components are important features for wildlife. They include moist areas (wallows, etc.); foraging areas (meadows and parks); critical hiding cover (see Glossary in Chapter VI for definition); thermal cover; migration routes; and staging areas. These areas will be mapped on a site-by-site basis during project area analysis.	Vegetation treatment projects (e.g., timber harvest, thinning and prescribed burning) shall maintain at least two-thirds (2/3) of Douglas fir, lodgepole pine, and subalpine fir conifer forest cover types (on National Forest System lands), with at least 40% canopy cover (on National Forest System lands), to function as hiding cover for elk at any point in time. Hiding cover will be assessed for an elk analysis unit (EAU) which is based on a collaborative mapping effort between the local state (MDFWP) wildlife biologist and the local Forest Service wildlife biologist. . . .

Judge Rawlinson found these omissions were inconsistent with the recommended amount of "good cover" from acknowledged experts in this field. See L. Jack Lyon, Et. Al, *Coordinating Elk and Timber Management*, FINAL REPORT OF THE MONTANA COOPERATIVE ELK-LOGGING STUDY, 1970-1985 9 (1985); *see also* Jack W. Thomas, et al., *Wildlife Habitats in Managed Forests: the Blue Mountains of Oregon and Washington*, 553 U.S.D.A. FOREST SERVICE HANDBOOK 109 (Sept. 1979). Judge Rawlinson found that the Amendments to the Forest Plan entirely failed to consider important aspects of the amendments, rendering their adoption of the amendments arbitrary and capricious.

Native Ecosystems Council v. Marten, No. 18-36067, 807 Fed. Appx. 658 (9th Cir. April 7, 2020) (not for publication)
Agency prevailed.

Issues: Categorical Exclusion (Extraordinary Circumstances, Cumulative Effects).

Facts: Native Ecosystems Council (NEC) challenged the USFS approval and application of a CATEX involving the Moose Creek Vegetation Project in Montana's national forest. In a limited opinion, the Ninth Circuit affirmed the lower court grant of summary judgment in favor of the agency.

Decision: First, the Ninth Circuit rejected NEC's contention that the USFS violated the law by designating areas under the Healthy Forests Restoration Act (HFRA) without engaging in a NEPA analysis, by pointing out it was previously decided in a precedent- setting decision in *Center for Biological Diversity v. Ilano*, 928 F.3d 774 (9th Cir. 2019). The *Ilano* court held that landscape-area designations under HFRA do not trigger a requirement for NEPA analysis.

NEC focused on one unit within the Project, called Unit 7, and on a field survey of that area conducted in 2016. NEC concluded this survey, rather than the USFS "Old Growth Report," represents the best scientific information, and NEC argued that the USFS erred by not taking the survey into account. The Ninth Circuit disagreed because the survey did not draw any conclusions about the presence of old growth in Unit 7. By contrast, the Old Growth Report covered the entire Project area and was conducted for the specific purpose of assessing old-growth conditions.

The Ninth Circuit rejected NEC's claims that the USFS failed to consider cumulative impacts, and that the USFS' determination that no extraordinary circumstances existed that would require further procedures under NEPA before approving the Moose Creek Vegetation Project was not arbitrary or capricious. NEC contended, specifically, that the forest clearing to be conducted through the Project, combined with past logging, would have a significant cumulative impact on species that thrive on "snag habitat."

The Ninth Circuit found the record did not support NEC's claims. The USFS conducted a "Snag Habitat Report" to estimate the Project's effect on snags (which are standing dead trees). That Report concluded that for all forest types except one, the number of snags per 100 acres would exceed the standards set by the governing Forest Plan. The sole exception was for a type of tree where the sample size was very small and of which no harvesting is scheduled under the Project. Therefore, the USFS was not arbitrary and capricious in applying a CATEX.

Conservation Congress v. U.S. Forest Serv., No. 19-15753, 805 Fed. Appx. 520 (Mem) (9th Cir. May 18, 2020) (not for publication)
Agency prevailed.

Issues: Impacts, Alternatives.

Facts: Conservation Congress, an environmental organization, challenged the USFS' actions in connection with the approval of the Bagley Hazard Tree Abatement Project, designed to identify and remove fire-damaged trees that pose a danger to users of the Shasta-Trinity National Forest's roadway. In a limited opinion, the Ninth Circuit affirmed the lower court grant of summary judgment in favor of the agency.

Decision: The Ninth Circuit held that the USFS adequately considered the impact of post-fire logging on private land in its EA. The USFS estimated the reasonably foreseeable impact of private-land logging on the forest in general and on northern spotted owl habitat, and developed an "environmental baseline, against which the incremental impact of a proposed project [was] measured." *Cascadia Wildlands v. Bureau of Indian Affairs*, 801 F.3d 1105, 1111 (9th Cir. 2015). The USFS detailed the methodology used to quantify the impact of the Project, providing both the underlying data and illustrative maps.

The Ninth Circuit opined that the USFS reasonably concluded that the Project did not require an EIS, but rather only an EA. *See* 40 C.F.R. § 1501.4. The Project would affect a small percentage of suitable owl critical habitat in the Shasta-Trinity National Forest, target only a narrow range of trees near open roads and remove only damaged trees hazardous to roadway users. Although the Project would involve felling hazardous trees within two Inventoried Roadless Areas ("IRAs") and one Late Successional Reserve ("LSR"), the USFS reasonably concluded that the impact on these areas was not significant, as only a small portion of the IRAs and LSR would be affected.

Finally, the Ninth Circuit determined that the USFS did not err in refusing to adopt Conservation Congress' proposed alternative, which was to conduct no logging or felling within IRAs, LSRs, and northern spotted owl critical habitat. Almost all of the Project area falls within one of those areas, and complete inaction in those areas would conflict with the Project's objective of making existing roads safe for use. *See N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 978 (9th Cir. 2006) (holding that an agency is not required to discuss alternatives that are "inconsistent with the basic policy objectives for the management of the area.").

Bitterroot Ridge Runners Snowmobile Club v. U.S. Forest Serv., No. 18-35875, 833 Fed. Appx. 89, 2020 WL 6292628, (9th Cir. Oct. 27, 2020) (not for publication)
Agency prevailed.

Issue: Supplementation.

Facts: An outdoor recreation club ("Bitterroot") challenged the USFS's decision to close 110 miles of trails to bicycles in two wilderness study areas (WSAs) and in two recommended wilderness areas ("RWAs"). In a short opinion, the Ninth Circuit affirmed the lower court grant of summary judgment in favor of the agency.

Decision: Bitterroot argued that the USFS' decision to close 110 miles of trails in the WSAs to bicycles required a supplemental EIS (SEIS) because the DEIS proposed prohibiting bicycle use only in the RWAs. *See* 40 C.F.R. § 1502.9(d)(1) (stating the requirements for an SEIS). No SEIS is required if the change is a "minor variation of one of the alternatives discussed in the [DEIS]" and is "qualitatively within the spectrum of alternatives." *Russell Country Sportsmen v. U.S. Forest Serv.*, 668 F.3d 1037, 1045 (9th Cir. 2011).

The Ninth Circuit affirmed the lower court's opinion that no SEIS was required. As to the first factor, the change was a minor variation of the proposal in the DEIS because it reduced the mileage available for bicycle use in the forest by only 9%. As to the second, the change was "qualitatively within the spectrum of alternatives" because the bicycle use restrictions in WSAs were qualitatively the same as those proposed earlier in the RWAs, so comments about the latter apprised the agency of relevant environmental effects in both areas. *See Russell Country*, 668 F.3d at 1049 ("[T]here is very little reason to believe the modified travel plan will have environmental impacts that the agency has not already considered."). The Ninth Circuit held that the USFS articulated a rational connection between the facts found and the choice made.

Cottonwood Envtl. Law Ctr. v. U.S. Sheep Experiment Station, No. 19-35511, 827 Fed. Appx. 768 (Mem), 2020 WL 6305976 (Mem) (9th Cir. Oct. 28, 2020)
Agency prevailed.

Issue: Impact Assessment.

Facts: Cottonwood Environmental Law Center and other organizations (collectively, Cottonwood) challenged the U.S. Sheep Experiment Station's and Agricultural Research Service's (collectively, ARS) issuance of a ROD authorizing the grazing of sheep on Sheep Station lands in Southwest Montana's Centennial Mountain. In a limited opinion, the Ninth Circuit affirmed the lower court grant of summary judgment in favor of the agency.

Decision: Cottonwood argued that the ARS violated NEPA by issuing a ROD that relies on a purportedly self-contradictory FEIS. The Ninth Circuit rejected Cottonwood's arguments. The Ninth Circuit disagreed with Cottonwood's contention that the NEPA analysis in the FEIS regarding human encounters with grizzly bears was arbitrary and capricious. NEPA does not "impose substantive environmental obligations on federal agencies" but "merely prohibits uninformed—rather than unwise—agency action." *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 351, 109 S.Ct. 1835 (1989). The Ninth Circuit found it was clear that ARS took a "hard look" at the consequences of continued sheep grazing in Montana's Centennial Mountains.

Cottonwood relied on a case where the agency changed its decision on the same factual record within a two-week period without a reasoned explanation for its change in course. *Organized Village of Kake v. U.S. Dep't of Agriculture*, 795 F.3d 956, 969 (9th Cir. 2015) (en banc). The Ninth Circuit distinguished *Kake*, finding that the ARS did not change its course but instead characterized bear encounters differently in different parts of the FEIS while assessing environmental impacts. It found that the FEIS addressed Cottonwood's concerns about "new information" about bear encounters, and not only described the 2008 bear encounters but also

specifically responded to Cottonwood's public comment to the DEIS regarding sheep herders being "chased," noting the protocols in place for sheepherder–grizzly bear encounters.

The Ninth Circuit discussed that, to the extent there were discrepancies in the FEIS's descriptions of grizzly bear encounters, they do not render the FEIS "so . . . misleading that the decisionmaker and the public could not make an informed comparison of alternatives." *Native Ecosystems Council v. Marten*, 883 F.3d 783, 795 (9th Cir. 2018). The Ninth Circuit held that the FEIS provided the public adequate access to information about the impact of" sheepherding on grizzly bears and their interactions with humans. *WildEarth Guardians v. Mont. Snowmobile Ass'n,* 790 F.3d 920, 927 (9th Cir. 2015).

U.S. DEPARTMENT OF DEFENSE

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

Issues: Standing, Connected Action (segmentation), Cumulative Impacts.

Facts: The Tinian Women Association and other environmental groups (collectively, TWA) challenged the U.S. Navy's (Navy) decisions to relocate troops from Okinawa, Japan to Guam and to construct training facilities on Northern Mariana Islands, pursuant to treaty obligation with Japan.

In October 2005, the United States and Japan signed the U.S.-Japan Alliance Agreement (the Agreement) to "adapt [their] alliance to the changing regional and global security environment," resulting in the determination to move Marine troops from Okinawa to Guam. The Agreement aimed to strengthen the countries' long-standing security alliance by realigning American forces in Japan to reduce "burdens on local communities, including those in Okinawa." Consequently, the US agreed to relocate approximately 8,000 Marines — including relocating the headquarters of the III Marine Expeditionary Force to Guam, with Japan providing more than $6 billion in funding. The two countries also planned to expand bilateral training throughout Japan and the Pacific. The United States and Japan memorialized these commitments in a February 2009 treaty that specifically provided that the "Government of the United States of America shall consult with the Government of Japan in the event that the Government of the United States of America considers changes that may significantly affect facilities and infrastructure funded by Japanese cash contributions."

In preparation for relocation of the Marines forces, the Navy established the Joint Guam Program Office (JGPO) and instructed the Marines to identify operational and training requirements for relocating troops both on Guam and the Commonwealth of the Northern Mariana Islands (CNMI). In 2007, the Navy published a NOI to prepare an EIS, explaining that "[t]he purpose and need of the proposed action is to fulfill U.S. government national security and alliance requirements in the Western Pacific Region."

As the internal debate between the Marine Corps and the United States Pacific Command about the scope of the relocation roiled, in 2009, the Secretary of the Navy determined the Marines' proposal to establish expanded training capabilities in the region required a "holistic assessment" of troop levels that should not be undertaken "in a series of 'kneejerk' decisions that may not necessarily be tied together or complementary with long term U.S. strategy."

The Navy issued the Relocation EIS in July 2010, which addressed the relocation of approximately 8,000 Marines to Guam, including the development and construction of training facilities on Guam and Tinian, one of the three principal islands of CNMI. The EIS analyzed several proposed training facilities, including one live-fire training range complex on Guam, and four training ranges on Tinian. The five ranges met individual and small unit training needs, "replicat[ing] existing individual-skills training capabilities on Okinawa." Because the ranges "[did] not provide for all requisite collective, combined arms, live, and maneuver training," the relocated Marines would need to travel to "sustain core competencies." Noting that the Marine Corps ultimately hoped to conduct integrated core competency training, the EIS explained that such a decision, along with the "suitability of CNMI to meet" this need, would be reviewed in 2010 during the Quadrennial Defense Review. Two months later, the Navy published its 2010 ROD. The Navy deferred its decision to construct the live-fire training facility on Guam until it completed analysis under the National Historic Preservation Act.

In February 2012, the Navy issued an additional NOI for a supplemental EIS (Relocation SEIS) to "evaluate the potential environmental consequences that may result from construction and operation of a live-fire training range complex and associated infrastructure on Guam." The Relocation SEIS was to address five alternative sites for the live-fire training range complex on Guam. In 2015, the Navy issued a ROD for the Relocation SEIS that approved the construction of a live-fire training range complex on Guam at a different location.

The Navy published another NOI, the CNMI Joint Military Training EIS/Overseas EIS ("CJMT Draft EIS"). The draft proposed creating additional range and training areas within the CNMI to address "unfilled unit level and combined level military training requirements in the Western Pacific." The Pacific Command proposed four training range complexes on Tinian and two training range complexes on Pagan, a volcanic island to the north. A deluge of comments followed, and the Navy decided to issue a revised draft with new alternatives and studies and is undergoing revision.

TWA alleged the Navy violated NEPA and the Administrative Procedure Act (APA) by failing to Consider: (1) the impact of all mission essential training for Guam-based Marines; and, (2) stationing alternatives beyond Guam and the CNMI. The district court granted summary judgment on the first claim in favor of the Navy and dismissed TWA's second claim. The court also concluded that the group waived a third claim challenging the Relocation EIS, and denied leave to amend.

Decision: TWA launched a two-pronged attack on the Navy's decision to relocate troops to Guam and construct training facilities on the CNMI. First, it argued the two decisions are "connected actions" that must be assessed in a single EIS. See 40 C.F.R. § 1508.25(a)(1). Alternatively, TWA contended that because the proposed training sites discussed in the CJMT Draft EIS will magnify the environmental effect of relocating Marines to Guam, these "cumulative impacts" must be addressed in the Relocation EIS. *See id*. § 1508.25(a) (2).

Actions are connected if they "[a]utomatically trigger other actions which may require EISs," "[c]annot or will not proceed unless other actions are taken previously or simultaneously," or "[a]re independent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. § 1508.25(a)(1). However, NEPA does not require an agency to treat actions as connected if they have independent utility and purpose. *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 969 (9th Cir. 2006). For instance, "[w]hen one of the actions might reasonably have been completed without the existence of the other, the two actions have independent utility and are not 'connected' for NEPA's purposes." *Id*. This is true even where each action might "benefit from the other's presence," *Nw. Res. Info. Ctr. v. Nat'l Marine Fisheries Serv.*, 56 F.3d 1060, 1068 (9th Cir. 1995), or where the actions have "overlapping, but not co-extensive goals," *Pac. Coast Fed'n of Fishermen's Ass'ns v. Blank*, 693 F.3d 1084, 1098 (9th Cir. 2012).

The Ninth Circuit concluded that the Marine relocation and the placing of training facilities on Tinian were not connected for the purposes of an EIS. The court focused that the Relocation EIS laying out multiple reasons for the relocation of Marines from Okinawa to Guam: positioning troops to defend the United States and its Pacific territories, providing a powerful presence in the Pacific region, fulfilling a commitment to Japan, and defending American, Japanese, and other allies' interests. Meanwhile, the CJMT Draft EIS explained the rationale for placing range and training facilities on Tinian and Pagan: they would "reduce joint training deficiencies for military services" and be able to "support ongoing operational requirements, changes to U.S. force structure, geographic repositioning of forces, and U.S. training relationships with allied nations." The Ninth Circuit found they were overlapping but not co-extensive.

TWA argued the Navy violated NEPA's mandate that an EIS must consider cumulative impacts. A "cumulative impact" is "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7; *see Ecology Ctr. v. Castaneda*, 574 F.3d 652, 666 (9th Cir. 2009). The rationale for evaluating cumulative impacts together is to prevent an agency from "dividing a project into multiple actions" to avoid a more thorough consideration of the impacts of the entire project. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 894 (9th Cir. 2002).

The court considered the standard that TWA only needed to show the potential for cumulative impact. The lower court found that TWA met this low burden but deferred the requirement for the Navy to address any cumulative impact in the EIS for the proposed range and training areas on Tinian and Pagan in the CJMT Draft EIS. TWA argued this was in error; however, the Ninth Circuit discussed that agencies could consider the cumulative impacts of actions in a subsequent EIS when the agency has made clear it intends to comply with those requirements and the court can ensure such compliance. By issuing a NOI to prepare an EIS for the training and ranges in the CNMI, the Navy "impliedly promised" to consider the cumulative effects of the subsequent action in the future EIS.

TWA claimed that the Navy failed to consider stationing alternatives beyond Guam and the CNMI for Marines relocating out of Okinawa. The court disagreed; although the agreement between the United States and Japan has been amended in the past to decrease the number of troops relocated to Guam, the resolution TWA sought would stretch the agreement beyond recognition. The treaty provided that the Marines "and their approximately 9,000 dependents will relocate from Okinawa to Guam." Granting the relief TWA sought would necessarily rescind the decision to relocate the troops to Guam, resulting in an order to the executive branch to rescind or modify the agreement. Indeed, even the amended agreement maintains the relocation of thousands of Marines from Okinawa to Guam. As in *Salmon Spawning*, even if the Navy's action was procedurally flawed, "a court could not set aside the next, and more significant, link in the chain—the United States' entrance into the Treaty." *Salmon Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220, 1227 (9th Cir. 2008). The Ninth Circuit held that TWA's second claim is not redressable by the judicial branch and must be dismissed for lack of standing.

Finally, the parties dispute whether the TWA waived a third claim — that the Navy failed to supplement the Relocation Final EIS after the 2012 Roadmap Adjustments that created substantial changes to the proposed action, such as changes to the exact Marine Corps units that would be relocated and the full-range of weapons, and training in the CNMI, that they would need. The Ninth Circuit discussed that because TWA explicitly raised the failure to supplement claim for the first time in summary judgment briefing, more than two years after the litigation commenced and six months after the administrative record was filed, and because it gave no prior notice to the Navy and requested leave to amend only after moving for summary judgment, the claim failed.

U.S. DEPARTMENT OF THE INTERIOR

General Land Office v. U.S. Dep't of the Interior, 947 F.3d 309 (5th Cir. 2020)
Agency prevailed its NEPA claim.

Issue: Federal Action.

Facts: The General Land Office of the State of Texas challenged FWS' listing and proposed delisting of an endangered species. The FWS listed the Golden-Cheeked Warbler as an endangered species in 1990. Approximately twenty-six years later, the FWS denied a petition asking it to delist the Warbler. The General Land Office claimed that both decisions are invalid. The Fifth Circuit affirmed the lower court's grant of summary judgment in favor of the agency involving the NEPA claim.

Decision: The Ninth Circuit considered the merits of the General Land Office's NEPA claim to the extent that the claim challenged the FWS's 2016 decision to deny the delisting petition. The district court's decision dismissing the claim under Rule 12(b)(6) is subject to de novo review. *Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co.*, 704 F.3d 413, 421 (5th Cir. 2013). NEPA does not require agencies to prepare an EIS if the agency's discretion is constrained by law such that it could not consider the information that would be contained in such a statement as part of its decision-making process. *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 769-70, 124 S. Ct. 2204 (2004).

The ESA prohibits FWS from considering the information that would be contained in an EIS when deciding whether to list or delist a species as endangered or threatened. The ESA carefully details the five biological factors that can render a species endangered or threatened, 16 U.S.C. § 1533(a)(1), and it requires decisions about whether a species is or is not endangered or threatened to be made "solely on the basis of the best scientific and commercial data available." *Id*. § 1533(b)(1)(A). The Sixth Circuit opined:

> [T]he statutory mandate of ESA prevents the [Service] from considering the environmental impact when listing a species as endangered or threatened.... The impact statement cannot insure the agency made an informed decision and considered environmental factors where the agency has no authority to consider environmental factors. As far as the determination to list a species is concerned, preparing an impact statement is a waste of time.

Pac. Legal Found. v. Andrus, 657 F.2d 829, 836 (6th Cir. 1981).

Since FWS did not need to prepare EIS for its listing decisions, EAs — which help agencies figure out whether they need to prepare EIS — are likewise unnecessary. FWS did not violate NEPA or its implementing regulations when it declined to delist the Warbler, and the court found that the district court correctly granted the FWS's motion to dismiss.

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

Issues: Alternatives, Impact Assessment (scientific accuracy).

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

As a matter of background, 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).

Over the past forty years, the deer population on the Seashore has grown substantially, negatively affecting the Seashore's vegetative and cultural resources and increasing the number of undesirable human-deer interactions.

The explosion of the deer population in the 1970s brought concerns about Lyme disease and the deer's destruction of the Seashore's vegetation. As a result, in the 1980s, Seashore staff, along with academic and agency scientists, began to study the 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." Reducing the harm to the vegetation in the Sunken Forest and the William Floyd Estate was a particular priority.

To prepare to develop the EIS, NPS began the "scoping process" to determine the issues the Plan should address, which included internal interdisciplinary team (IDT) meetings to identify the "purpose, need, and objectives" of the Plan. The IDT included NPS staff from various offices, NPS consultants, and staff from the US Geological Survey Patuxent Wildlife Research Center. It continued to meet throughout the NEPA process; its role was to develop the alternatives that the EIS would evaluate in further detail.

In June 2011, NPS convened a Science Advisory Team (the SAT) of fourteen experts to answer technical questions from the IDT. It was tasked with considering how the deer population was affecting natural and cultural resources and creating social issues, particularly in the Communities, the Sunken Forest, and the William Floyd Estate. The SAT conducted eight conference calls, each scheduled to last approximately four hours, between June 2011 and February 2012. The SAT provided two reports to the IDT, a summary report in December 2011, and its final recommendations (the SAT Final Report) in February 2012.

Having received the SAT's recommendations, the IDT took part in a series of workshops (the Alternatives Development Workshops) and calls (the Alternatives Refinement Calls) to develop and refine the range of alternatives that the EIS would consider for dealing with the deer problem at the Seashore. The first Alternatives Development Workshop was held over a

three-day period in December 2011. The SAT provided a summary of its recommendations in advance of that workshop. After it received the SAT Final Report, the IDT held a second Alternatives Development Workshop over two days in June 2012. It continued to meet, via telephone, for five Alternatives Refinement Calls between August and September 2012 to further discuss specific issues and distill the alternatives. Members of the SAT attended both the Alternatives Development Workshops and the Alternatives Refinement Calls.

This process culminated in the issuance of a Final EIS in December 2015 and 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. 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, while Alternatives C and D used direct reduction methods such as sharpshooting, capture and euthanasia, and public deer hunting.

Once the population had been reduced, Alternative B planned to use the fertility control agent to maintain the target deer density. Alternative C contemplated the continued use of the direct reduction methods to maintain the target deer density, and Alternative D suggested a combination of direct reduction and fertility control.

Each of the action alternatives included additional methods to manage the deer in the areas where they were particularly problematic: The Communities, the Sunken Forest, and the William Floyd Estate. Within the Communities, Alternative B proposed to relocate deer that were approaching humans to the Wilderness, while Alternatives C and D proposed to capture and euthanize such deer. All three action alternatives proposed erecting a fence around the Sunken Forest and moving the deer out of that area. Finally, each action alternative proposed various fencing options for the William Floyd Estate. Alternative D contemplated a permanent fence around the historic core and moving the deer out of the fenced area. The goal of the fencing was to eliminate the deer entirely from the Sunken Forest and the William Floyd Estate's historic core.

Ultimately, 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."

In 2015, after years of study, NPS approved the Plan to reduce the deer population on the Seashore and manage the impact of the remaining deer. FOA contends that NPS's EIS and its decision to approve the Plan violated NEPA because the agency (1) lacked essential information, (2) failed to take a hard look at the environmental consequences of its action, (3) implemented a Seashore-wide target deer density despite a lack of evidence to support that decision, and (4) failed to consider all the reasonable alternatives. The Second Circuit affirmed the lower court's grant of summary judgment in favor of the agency.

Decision: Friends argued that NPS violated NEPA because it lacked information about deer movement on the Seashore. The agency is excused from obtaining the information if the cost of doing so is exorbitant or if the means to obtain it are unknown, but, in that case, the EIS must state "that such information is incomplete or unavailable," and it must provide other information to help analyze the reasonably foreseeable significant adverse impacts on the human environment. *Id*. § 1502.22(b).

Friends asserted that information about the deer movement across the Seashore was essential. The

court did not find that any information was lacking in the SAT Final Report about deer movement to make a recommendation or that NPS needed that information to develop the alternatives. Over the course of its numerous conference calls, the SAT reviewed a large quantity of scientific literature. NPS was not required to obtain the information about deer movement because it was not essential to a reasoned choice among alternatives.

Friends argued that NPS failed to take a "hard look" at the differences between the deer population on the eastern and western portions of the island when making its decision. The court found evidence that the deer populations on the eastern and western portions of the island differ and that, at some points in their many conference calls, members of the SAT indicated that it might be beneficial to distinguish between the two populations. The SAT Final Report did not state that the eastern and western portions of the Seashore need to be managed differently, but it does provide specific recommendations for the Communities, the Sunken Forest, and the William Floyd Estate, which lie from west to east on the Seashore.

The court reiterated that the NPS was not bound by the SAT's recommendations. The SAT was convened to "[p]rovide scientific based input (both natural and social) for consideration by the [IDT]." The SAT Final Report was simply information for the IDT to consider as it developed the alternatives. ("[The Final SAT Report] was used to inform the development of the alternatives."). In fact, rather than stating that its approach was the only permissible way to proceed, the SAT Final Report recognized that each of its recommendations presented difficulties and NPS would have to balance various factors "in developing a plan for action."

Moreover, although NPS's chosen plan implemented a Seashore-wide target deer density, rather than site-specific targets for different regions, it also included distinctive management actions in the Communities, the Sunken Forest, and the William Floyd Estate. Accordingly, despite Friends' contention, to the extent that the SAT Final Report can be read as a recommendation to distinguish between the eastern and western portions of the Seashore, the NPS followed that recommendation.

The Second Circuit held that the NPS made a reasoned decision after years of discussion and study by numerous experts. First, NPS had information from the studies conducted over the thirty years prior to the start of the NEPA process. Second, it held internal meetings to identify the Plan's objectives. Third, it enlisted the help of numerous experts to provide technical expertise, including the SAT and staff from the New York State Department of Environmental Conservation (NYS DEC) and the United States Department of Agriculture's Animal and Plant Health Inspection Service (USDA). Fourth, upon receiving the SAT's recommendations, it held a series of multi-day workshops and numerous calls where it discussed those recommendations. In short, it is abundantly clear that NPS took a hard look at the environmental consequences of the Plan.

The Second Circuit held that NPS presented a rational basis for its decision to employ a Seashore-wide target deer density. The court found the decision did not conflict with the recommendations of the SAT and the IDT. Rather than being contrary to the IDT's recommendations, the record reveals that the decision to use a Seashore-wide target deer density, rather than site-specific targets, was developed at an IDT meeting. The IDT discussed the difficulties associated with site-specific and Seashore-wide target deer densities and considered "whether it is practical to have different densities for different areas in the seashore and whether it is possible to achieve the densities in such small areas."

Ultimately, NPS ruled out a site-specific deer density target approach in favor of a Seashore-wide target deer density in part because it lacked site-specific information about how the lowered deer density would affect Seashore resources. Instead, the Seashore-wide target density was intended to balance anticipated benefits associated with a reduced deer population with consideration for available resources and the cost of implementation.

NEPA is not an animal protection statute, and the deer – as sympathetic as such sentient creatures are – are only one of the many environmental factors the agency was required to, and did, consider. Second, there is evidence that the Seashore-wide target deer density level furthers the Plan's objectives to protect native vegetation and promote its natural regeneration. NPS conducted preliminary vegetation sampling at numerous areas on the Seashore, including the Sunken Forest, Talisman, and Blue Point, the results of which "clearly point[ed] to a decline in tree seedlings, shrubs, herbaceous annuals,

and perennials due to browsing from a high density of deer." In sum, because NPS has articulated a rational basis for its choice, the Ninth Circuit held that its decision was neither arbitrary nor capricious.

Friends argued that NPS violated NEPA because it did not adequately consider all of the reasonable alternatives. In addition to a no-action alternative, NPS considered three action alternatives. Each of the action alternatives included measures to reduce the deer population that ranged in severity from fertility control to sharpshooting. The action alternatives shared common elements, like public education and fencing, that were aimed at managing the impacts of the remaining deer population. Friends argues that NPS was obligated to consider an alternative that contained those elements but did not include any strategy to reduce the deer population.

The NEPA process was initiated because, after years of study, NPS determined that the increase in the deer population was negatively affecting the Seashore. One of the Plan's objectives is to "[m]anage a viable white-tailed deer population in the Seashore that is supportive of the other objectives for this plan/EIS." Those other objectives include, among other things, promoting natural regeneration of native vegetation and protecting vegetation communities from a high level of deer browsing. To achieve those vegetation objectives, NPS reasonably determined that a reduction in the deer population was necessary. Without a mechanism to reduce the deer population, Friends' proposed alternative fails to further the Plan's vegetation objectives.

A review of NPS's rationale for rejecting Alternative B, which did contain a mechanism to reduce the deer population, demonstrates the insufficiency of Friends' proposal. 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 even with the fencing at the Sunken Forest and the William Floyd Estate. 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.

Given that the agency 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, there is 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. As a result, NPS was not obligated to consider it.

Circuit Judge Newman wrote a concurrence, distinguishing his reasoning involving the majority's analysis of the CEQ's regulation because Judge Newman would apply the reasoning under the CEQ Regulations for incomplete or unavailable information, 40 C.F.R. 1502.22.

Stand Up for California! v. U.S. Dep't of the Interior, 959 F.3d 1154 (9th Cir. 2020)
Agency did not prevail on its NEPA claim.

Issue: Federal Action (thresholds).

Facts: An assortment of organizations, individuals and a religious organization (collectively, Stand Up) challenged DOI's issuance, under the Indian Gaming Regulatory Act (IGRA), of Secretarial Procedures which authorize the North Fork Rancheria of Mono Indians to operate class III gaming activities on a parcel of land in Madera, California.

In 2005, the North Fork Rancheria of Mono Indians (North Fork)—a federally recognized Indian tribe—submitted a fee-to-trust application for the United States Department of the Interior (DOI) to take 305 acres of land in Madera, California (Madera Parcel), into trust to be developed into a hotel and casino. In reviewing the fee-to-trust application, the DOI completed an EIS under NEPA and made a conformity determination under the CAA, which were both upheld as valid in a legal action challenging the fee-to-trust determination. *Stand Up for California! v. Dep't of the Interior,* 204 F. Supp. 3d 212, 323 (D.D.C. 2016).

After the State of California voters vetoed the Tribal-State compact to govern gaming activities on the Madera Parcel, and the state refused to negotiate another compact, and when no agreement was reached between the parties, the district court appointed a mediator, who adopted North Fork's proposed compact. When California did not consent to the proposed compact, the mediator submitted the proposed compact to the Secretary to prescribe Secretarial Procedures consistent with the mediator-selected compact, authorizing class III gaming on the Madera Parcel, pursuant to 25 U.S.C. §

2710(d)(7)(B)(vii). The Secretary issued those Secretarial Procedures on July 29, 2016. Stand Up claimed that DOI's Secretarial Procedures triggered NEPA, and an analysis should be been conducted.

The Ninth Circuit vacated and remanded the case to address the NEPA question of federal action; the lower court previously granted summary judgment in favor of the agency involving the NEPA claim.

Decision: The Ninth Circuit reviewed the district court's conclusion that the Secretary had no obligation to complete an EIS under NEPA based on the district court's determination that the Secretary lacks all discretion to comply with any other federal laws besides IGRA.

NEPA was enacted to "provide[ ] the necessary process to ensure that federal agencies take a hard look at the environmental consequences of their actions." *San Diego Navy Broadway Complex Coal. v. United States Dep't of Def*., 817 F.3d 653, 659 (9th Cir. 2016). Under NEPA, an agency is required to conduct an EIS for all "major Federal actions significantly affecting the quality of the human environment," 42 U.S.C. § 4332(2)(C), so long as the agency has some control over preventing the environmental effects—the so-called "rule of reason." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767, 770, 124 S.Ct. 2204 (2004) (for the requirement to apply, the agency's action must have a "reasonably close causal relationship" with the environmental effect, and "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect").

The district court determined that the Secretary lacked the requisite discretion and control to be required to conduct an EIS. The district court pointed to the language of IGRA, which provides that "the Secretary shall prescribe . . . procedures . . . which are consistent with the proposed compact selected by the mediator . . . [including] the provisions of [IGRA], and the relevant provisions of the laws of the State." 25 U.S.C. § 2710(d)(7)(B)(vii). Noting the statute's use of mandatory language ("shall"), the district court read the provision to contain an exhaustive list of authorities to be considered. The Ninth Circuit disagreed with the lower court, stating that NEPA "[w]e have recognized only "two circumstances where an agency need not complete an EIS even in the presence of major federal action and 'despite an absence of express statutory exemption' ": (1) "where doing so 'would create an irreconcilable and fundamental conflict' with the substantive statute at issue," and (2) where, "in limited instances, a substantive statute 'displaces' NEPA's procedural requirements." *Id*. at 963. The Ninth Circuit found neither applied.

The Ninth Circuit discussed the claim that the Secretary had no discretion whatsoever over the form of its Procedure – and did not read the command that Secretarial Procedures be "consistent with the proposed compact selected by the mediator . . . the provisions of [IGRA], and the relevant provisions of the laws of the State," 25 U.S.C. § 2710(d)(7)(B)(vii), to mean that the Secretary must in every case adopt the mediator-selected compact wholesale, without modification.

The court considered that although the statute enumerates some authorities that the Secretary must consider, it does not by its terms preclude the Secretary from considering other federal law. Indeed, although other circuits have held that the Secretary's role in prescribing Secretarial Procedures is limited in certain ways, no court has ever held that the Secretary entirely lacks discretion to consider federal law at all in issuing Procedures. *Public Citizen*, which held that the "rule of reason" obviated NEPA's requirements, is distinguishable because that case involved a situation in which an agency unambiguously had no discretion to change the decision made by the President. *See* 541 U.S. at 770, 124 S.Ct. 2204 ("Because the President, not FMCSA, could authorize (or not authorize) cross-border operations . . . and because FMCSA has no discretion . . . its EA did not need to consider the environmental effects arising from the entry.").

Given that IGRA did not foreclose all consideration of applicable federal laws by the Secretary when issuing Secretarial Procedures, there is no "irreconcilable and fundamental conflict" between IGRA and NEPA. Similarly, the implicit goal of IGRA to allow expedited authorization of tribal gaming, is not the same as "an unyielding statutory deadline for agency action" and does not rise to the level of a fundamental, irreconcilable conflict. IGRA also does not "displace" NEPA because it does not create any comparable process for ensuring environmental protection.

The court analogized the that a construction in which the Secretary retains some discretion to consider and

comply with applicable federal laws avoids a situation where the Secretary would potentially be required to violate federal law, including perhaps the Constitution, by issuing Secretarial Procedures—a situation which no doubt Congress did not intend.

In short, the Ninth Circuit concluded that IGRA did not categorically bar application of NEPA because the two statutes are not irreconcilable and do not displace each other, and because a contrary result would contravene congressional intent and common sense. The Ninth Circuit vacated the district court's order and remanded for the district court to consider: (1) whether the Secretarial Procedures were a "major Federal action" triggering NEPA's requirements in the first place; (2) if so, whether the Secretary could rely on the prior EIS for present purposes; and (3) if the Secretary could not do so, whether to remand to the Secretary to comply with NEPA by supplementing the prior EIS.

American Wild Horse Campaign v. Bernhardt, 963 F.3d 1001 (9th Cir 2020)
Agency prevailed.

Issue: Assessment of Impacts

Facts: A wild horse advocacy organization and an individual (collectively, American Wild) challenged BLM's decision to geld wild male horses and use an immunocontraceptive vaccine on wild mares. The Ninth Circuit affirmed the lower court's grant of summary judgment in favor of the agency.

As a matter of background, public lands in the American West are home to thousands of wild, free-roaming horses. Congress tasked BLM with preserving these "living symbols of the historic and pioneer spirit of the West," while also balancing the needs of other wildlife and livestock that depend on the resources of public lands. 16 U.S.C. § 1331. When wild horses become too numerous for the land to support, Congress has mandated that BLM remove excess horses until it reestablishes ecological balance. *Id*. § 1333.

In 2017, BLM determined that there was an overpopulation of wild horses in northeastern Nevada, and it developed a plan to restore ecological balance in the region. To remove as few horses as possible, BLM planned to adjust the sex ratio of the population, administer fertility control treatments to mares, and geld and release back to the range some male horses.

The Antelope and Triple B Complexes comprise about 2.8 million acres of public lands in northeastern Nevada and are home to thousands of wild horses. More than a decade ago, BLM established that those areas could sustain a total of between 899 to 1,678 wild horses. In 2017, based on a current inventory of the lands, BLM determined that the Complexes contained an excess population of about 8,600 wild horses and that action was necessary to remove them. Once BLM made that determination, the Act required BLM to "immediately remove excess animals." 16 U.S.C. § 1333(b)(2).

BLM developed the Antelope and Triple B Complexes Gather Plan ("Gather Plan") to address the excess, while also keeping its management activities to "the minimal feasible level." Under the Gather Plan, BLM would remove the excess wild horses over a ten-year period. Horses will be gathered in phases as necessary to achieve a core breeding population at the low range of the appropriate management level. The plan also calls for adjusting sex ratios and administering fertility-control treatments to mares to slow population growth rates and increase intervals between gathers.

To reduce the number of horses that need to be removed permanently from public lands and kept in long-term holding facilities, BLM would geld some male horses and release them back onto the range "where they can engage in free-roaming behaviors." By doing so, BLM can reduce the breeding population to the low end of the appropriate management level but keep the total population of horses at mid-range. The primary purpose of the gelding component is not to slow population growth, but to allow more horses to remain free roaming than otherwise would be possible.

Decision: America Wild argued that five intensity factors demonstrate that BLM's Gather Plan may have a significant impact: (1) the Plan has highly uncertain effects; (2) the Plan has highly controversial effects; (3) the area has unique characteristics; (4) the decision establishes a precedent; and (5) the decision threatens a violation of the Wild Free-Roaming Horses and Burros Act. 40 C.F.R. § 1508.27(b)(3), (4), (5), (6), & (10).

1. Highly Uncertain Effects

When the possible effects of an agency's action are so "highly uncertain" that they raise "substantial questions" about whether the action will have a significant impact on the environment, the agency must prepare an EIS. 40 C.F.R. § 1508.27(b)(5). The Ninth Circuit held that BLM's plan to geld and release male horses to the range did not meet that threshold because gelding horses is not a new practice, and its effects are well understood. The EA thoroughly reviewed the research on the surgical procedure, on the effects of gelding on domesticated and semi-feral horses, on the effects of castration on other species, and on the natural social behavior of wild horses. BLM used the existing research to predict that those effects likely would be insignificant.

The Ninth Circuit summarized that even though the agency did not have perfect information and had to extrapolate -- that did not make the possible effects "highly uncertain" and did not require the preparation of an EIS. While acknowledging that available research was not perfectly analogous, BLM used the existing evidence to assess the level of uncertainty and made "reasonable predictions on the basis of prior data" to conclude that there would be no significant environmental impact. *Ctr. for Biological Diversity v. Kempthorne*, 588 F.3d 701, 712 (9th Cir. 2009). Although the EA did not always make BLM's reasoning explicit, we will "uphold a decision of less-than-ideal clarity if the agency's path may reasonably be discerned." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658, 127 S.Ct. 2518 (2007).

Exactly what role geldings will play within the wild-horse population when they return to the range is unknown, but BLM reasonably concluded that there was no reason to expect any behavioral change in individual geldings to be significant. BLM further concluded that the effects of gelding on individual horses would not be more significant than the effects of the alternative—permanently removing those horses from public lands.

BLM likewise considered the effects on family structures among wild horses and reasonably concluded that there would be no significant effects. BLM cited a study finding that the presence of geldings did not disrupt relationships between mares and foals. BLM further noted that the plan will not geld a large enough number of males to substantially reduce population growth rates. Because the number of geldings will not be sufficient to affect reproductive patterns, it is less likely that geldings would significantly affect other family dynamics. BLM provided a scientific foundation for its assumptions and predictions.

American Wild did not identify any evidence affirmatively showing that returning geldings to the range would affect herd behavior. And BLM engaged with the currently available scientific evidence either by discussing the studies expressly or by addressing the concerns that the research raised. American Wild pointed to the National Academy of Sciences (NAS). The Ninth Circuit determined that report acknowledged the dearth of applicable scientific evidence and was ultimately inconclusive. Only one study of domestic horses found increased aggression in geldings; the court reasoned that a single study does not *per se* suffice to demonstrate highly uncertain effects.

Finally, there was no other available information that BLM should, or could, have used to reduce the uncertainty about the effects of gelding and release. The Gelding Study, a five-year study commissioned by BLM in 2016, revealed BLM's opinion that the effects on herd behavior are not fully understood but does not suggest that BLM expects the effects to be significant—or even that there will be an effect at all. *Compare National Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722 (9th Cir. 2001), *abrogated on other grounds as recognized by Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157, 130 S.Ct. 2743 (2010) (finding that the scientific evidence revealed definite adverse effects); *Ocean Advocates v. U.S. Army Corps of Engr's*, 402 F.3d 846, 867 (9th Cir. 2005) (identifying evidence that the agency's action would have an "unquestionably severe" effect on the environment; that the agency failed to collect available data, conduct projection analyses, or provide a "justification regarding why more definitive information could not be provided.").

The court clarified that BLM is not required to wait years before acting simply because an ongoing study might shine light on an uncertainty that BLM reasonably predicts will be minor or nonexistent.

2. Highly Controversial

The effects of the Gather Plan are not "highly controversial." 40 C.F.R. § 1508.27(b)(4). The evidence that American Wild identified did not cast

serious doubt upon the reasonableness of the agency's conclusions. Mere opposition to an action does not, by itself, create a controversy within the meaning of NEPA regulations. BLM considered and addressed the existing literature in its environmental assessment and provided reasoning for its conclusions. *See Native Ecosystems Council v. U.S. Forest Serv.,* 428 F.3d 1233, 1240 (9th Cir. 2005) ("Simply because a challenger can cherry pick information and data out of the administrative record to support its position does not mean that a project is highly controversial.").

3. Unique Characteristics

BLM's determination that the gather area is not in close "proximity to historic or cultural resources" was not arbitrary or capricious. 40 C.F.R. § 1508.27(b)(3). Wild horses are not a cultural resource for purposes of NEPA. Congress, through the Wild Free-Roaming Horses and Burros Act, decided how wild horses should be managed and how the effects of agency actions on those horses should be evaluated. The Act states that wild horses will be considered "an integral part of the natural system of the public lands," 16 U.S.C. § 1331, and specifically instructs that they should be managed "as components of the public lands" and as a part of a "natural ecological balance." *Id.* § 1333(a).

4. Precedent

The Gather Plan does not establish "a precedent for future actions with significant effects," nor does it represent "a decision in principle about a future consideration." 40 C.F.R. § 1508.27(b)(6). The Gather Plan does not establish gelding as an accepted population-management tool, nor is it the first instance of BLM's releasing geldings to the range. The conclusions in the EA for the Gather Plan are specific to the scientific evidence that is currently available. Like most EAs the Gather Plan's EA is highly specific to the project and the locale.

5. Threatened a Violation of Law

Finally, because BLM has followed the mandates of the Wild Free-Roaming Horses and Burros Act, its decision to geld and release does not threaten a violation of federal law. 40 C.F.R. § 1508.27(b)(10). The Ninth Circuit concluded that BLM permissibly determined that the intensity factors, whether considered individually or collectively, did not show that the Gather Plan would have a significant effect on the environment. Accordingly, BLM permissibly concluded that preparation of an EIS was not required.

Northern Alaska Envtl. Ctr. v. U.S. Dep't of the Interior, 983 F.3d 1077 (9th Cir. 2020).[5]
Agency prevailed.

Issues: Scope of programmatic EIS and Statute of Limitations.

Facts: Environmental organizations (collectively NAEC) claimed that BLM failed to prepare a required NEPA analysis for its 2017 offer and sale of oil and gas leases (the 2017 lease sale) in the National Petroleum Reserve-Alaska (the Reserve). BLM contended that it conducted the requisite NEPA analysis in an EIS prepared in 2012 and that any challenge to the adequacy of the 2012 EIS is subject to a 60-day statute of limitations pursuant to the Naval Petroleum Reserves Production Act (NPRPA), 42 U.S.C. § 6506a(n)(1). The Ninth Circuit affirmed the lower court's grant of summary judgment in favor of the agency.

The Reserve comprises over 23 million acres of land located along the north coast of Alaska, an area roughly the size of Indiana. This vast expanse of Arctic tundra provides habitat for polar bears, grizzly bears, gray wolves, moose, caribou, and dozens of species of migratory birds. It is home to numerous Native Alaskan communities that practice a subsistence way of life, relying on the biological resources of the Reserve. It is also a significant source of oil and gas.

As of 2017, the U.S. Geological Survey (USGS) estimated that technically recoverable petroleum resources underlying the Reserve include 8.7 billion barrels of oil and 25 trillion cubic feet of natural gas. BLM manages 22.6 million acres of the Reserve pursuant to the NPRPA, 42 U.S.C. §§ 6501–07. The NPRPA directs BLM to lease Reserve land to private entities for oil and gas development, while taking such measures as BLM deems necessary or appropriate to mitigate adverse environmental impacts. 42 U.S.C. § 6506a.

[5] *Opinion amended and superceded* by 965 F.3d 705 (9th. Cir. 2020); original opinion issued originally on same date and facts as *Natural Res. Def. Council v. Bernhardt*, No. 19-35006, 820 Fed. Appx. 520 (9th Cir. Jul. 9, 2020) (not for publication)

In 2012, BLM published a 2,600-page document styled as a combined Integrated Activity Plan (IAP) and EIS, designed to determine the appropriate management of all BLM-managed lands in the Reserve. The IAP/EIS analyzed five alternative proposals (which included mitigations -- stipulations or required operating procedures or best management practices) for a range of land allocations, including different options for the percentage of lands that would be made available for oil and gas leasing. The IAP/EIS designated as its preferred alternative a proposal that would make approximately 52% of the federal lands in the Reserve available for oil and gas leasing.

To analyze the environmental consequences of the various alternatives, BLM developed a set of hypothetical development scenarios based on assumptions it considered reasonable, seeking to minimize the chance that its analysis would underestimate potential impacts. BLM assumed that multiple annual lease sales would be held, each of which might offer all or only part of the lands made available for oil and gas leasing, and that the industry would need time to evaluate existing leases before leasing additional tracts. BLM assumed that full exploration and development of petroleum resources in the Reserve would take place over many decades. Based on the then-most recent USGS estimates, BLM assumed that the Reserve contained 896 million barrels of technically recoverable oil, 604 million barrels of which were economically recoverable.

The IAP/EIS predicted that it would fully satisfy NEPA's requirements for the first oil and gas lease sale. With respect to anticipated subsequent lease sales, it stated that BLM would prepare an administrative determination of NEPA adequacy (DNA) in connection with each proposed lease to determine whether the then-existing NEPA documentation was adequate.

In 2013, BLM published a ROD that finalized its decision to manage the Reserve under the preferred alternative. Each year thereafter, through 2016, BLM offered oil and gas leases on 1–2 million acres of the Reserve, but ultimately sold leases on only a small portion of the offered acreage. In conjunction with each offering, BLM prepared a four-page DNA documenting its conclusion that the 2012 EIS remained adequate to meet the requirements of NEPA. In December 2017, BLM sought more leases, and BLM accepted the applicant's sole bids in January 2018. During this same period, the USGS published an updated Assessment of Undiscovered Oil and Gas Resources in formations underlying the Reserve, raising the estimate of technically recoverable oil to 8.7 billion barrels.

In early February 2018, NRDC filed a Complaint alleging that BLM had conducted the 2017 lease sale without complying with NEPA. The Complaint highlighted the updated USGS Assessment along with several other recent developments that it claimed BLM had failed to properly analyze.

Later that month, BLM issued a nine-page Revised DNA that discussed several of those recent developments. The Revised DNA found the updated USGS Assessment unusable because it did not provide an estimate of economically recoverable resources, and because it included oil and gas underlying land and sea adjacent to the Reserve. It also found several other developments insignificant because the 2012 EIS had "already erred on the conservative side and over analyzed likely potential impacts." BLM's Acting Alaska State Director approved the Revised DNA.

Decision: The Ninth Circuit reviewed whether the 2012 EIS was the EIS for the 2017 lease sale and then considered how that determination should be made. It acknowledged that the 2017 lease sale represented an irretrievable commitment of resources necessitating a site-specific analysis in an EIS; however, it did state that a programmatic EIS prepared for a broad-scale land use plan may provide site-specific analysis required.

In making the decision, first, the Ninth Circuit examined whether a site-specific EIS was required. Whether a lease is a critical decision requiring an EIS depends on whether the lease reserves the agency's absolute right to preclude surface-disturbing activity. *See e.g., Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 782 (9th Cir. 2006). The Ninth Circuit found that there was no question that these type of oil and gas leases constitute "an irretrievable commitment of resources," and thus require "site specific analysis in [an] EIS." *Northern Alaska Env't Ctr. v. Kempthorne*, 457 F.3d 969, 975-976 (9th Cir. 2006). The Ninth Circuit then looked at whether an EIS has already been prepared that contemplated the site-specific analysis required.

NRDC claimed that a single document cannot be both a programmatic EIS for a broad-scale land management plan and also a site-specific EIS for an irretrievable commitment of resources relying on *Native Village of Point Hope v. Jewell*, 740 F.3d 489, 497 (9th Cir. 2014) (distinguishing between the EIS analysis required for a programmatic plan that guides management of multiple-use resources, versus for a site-specific plan at the implementation stage). The court rejected this argument and relied on *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982), finding it demonstrated that a single "federal action" for purposes of NEPA can be both broad-scale and site-specific, and can be evaluated at both of those levels in a single EIS.

The Ninth Circuit found the case similar to *Northern Alaska Env't Ctr. v. Kempthorne*, 457 F.3d 969 (9th Cir. 2006), where BLM had prepared a combined IAP and EIS to open parts of the Reserve within the Northwest Planning Area to oil and gas leasing. 457 F.3d at 973–74. *Kempthorne* provided strong support for the conclusion that nothing legally precludes BLM from analyzing both an IAP and NPRPA lease sales in the same EIS. The Ninth Circuit held that agencies may use a single document to undertake both a programmatic-level analysis and a site-specific analysis at the level appropriate for any irretrievable commitments of resources. Thus, the fact that the 2012 EIS provided a programmatic-level analysis for the IAP does not preclude the legal possibility that it also served as the necessary site-specific analysis for future lease sales.

The court also examined the question of what "degree of site specificity" is required. *Kempthorne,* 457 F.3d at 976. "If it is reasonably possible to analyze the environmental consequences" of a particular type at a particular stage, "the agency is required to perform that analysis." *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, (9th Cir. 2002) (requiring analysis of foreseeable impacts to species at the resource management plan stage, notwithstanding that those impacts could be analyzed more precisely at a later site-specific project stage). Thus, when an oil and gas lease constituted an "irretrievable commitment of resources," the required degree of analytical site specificity depends on the specificity of the "reasonably foreseeable" environmental impacts in light of the factual context.

The court examined *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 718 (10th Cir. 2009) and *Kempthorne.* It found, in *Richardson*, the challenged lease pertained to a relatively small parcel (less than 2,000 acres) and the record contained sufficient information on which to predict the number of wells that the leaseholder would want to construct. *Id*. at 717–18. Given these facts, the Tenth Circuit concluded that "the impacts of this planned gas field were reasonably foreseeable before the . . . lease was issued." *Id*. at 718.

The court held that *Kempthorne* dictated that the type of analysis employed in the 2012 EIS may qualify as the site-specific analysis required of a critical decision given appropriate factual circumstances. In *Kempthorne,* the Ninth Circuit upheld BLM's method of using "hypothetical situations that represented the spectrum of foreseeable results" as a way of analyzing oil and gas leasing in the Reserve's Northwest Planning Area. 457 F.3d at 976.

The court found that because they concluded that the 2012 EIS covered future lease sales, the NPRPA, 42 U.S.C. § 6506a(n)(1), statute of limitations[6] makes it unnecessary for the court to resolve whether BLM employed the precise degree of site specificity required.

The Ninth Circuit reviewed that NEPA regulations provide two frameworks within which additional NEPA analysis may occur after an initial EIS is finalized: namely, tiering and supplementation. Tiering refers to the incorporation by reference in subsequent EISs or EAs, which concentrate on issues specific to the current proposal, of previous broader EISs that cover matters more general in nature. 40 C.F.R. § 1508.28. Supplementation refers to the process of updating a previous EIS in situations where

[6] The NPRPA contains the following statute of limitations: Any action seeking judicial review of the adequacy of any program or site-specific environmental impact statement under section 102 of [NEPA] concerning oil and gas leasing in the National Petroleum Reserve--Alaska shall be barred unless brought in the appropriate District Court within 60 days after notice of the availability of such statement is published in the Federal Register. Early in its analysis the Ninth Circuit determined if the 2012 EIS was the EIS for the 2017 lease sale, then BLM did not fail to prepare an EIS, and NRDC's first claims fail on the merits. If the 2012 EIS was not an EIS for the 2017 lease sale—in other words, if the 2017 lease sale required at least a tiered EA regardless of the adequacy of the 2012 EIS—then NRDC's claims would not be affected by the statute of limitations.

the agency makes substantial changes to the proposed action, or there are significant new circumstances or information. *Id*. § 1502.9(c). The NEPA regulations do not provide any express guidance for determining whether to prepare a tiered NEPA analysis or a supplemental NEPA analysis in borderline cases. *See* Daniel R. Mandelker et al., NEPA LAW & LITIGATION, § 9:12 (2d ed., Aug. 2019 update).

The court considered various claims and cases, but considering the statute of limitations and the need for fair notice to the public – it focused its lens on whether the scope of the 2012 EIS contemplated the 2017 lease sale. In its review, the court looked at the need for the action and the criteria for scope (§ 1508.25). Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement. 40 C.F.R. § 1502.4(a). The regulations further specify that the following types of actions "should" be included within the scope of a single EIS:

(1) "Connected actions," meaning actions that:
(i) "Automatically trigger other actions,"
(ii) "Cannot or will not proceed" without other actions, or
(iii) "Are interdependent parts of a larger action and depend on the larger action for their justification"; and
(2) "Cumulative actions," meaning actions that have cumulatively significant impacts.

Id. § 1508.25(a). A third category, "Similar actions," "may" be included within the scope of a single EIS. Id. Agencies must use a public "scoping" process to decide the scope of "actions, alternatives, and impacts to be considered in an environmental impact statement." *Id*. §§ 1501.7, 1508.25.

The 2012 EIS abstract identified the "Proposed Action" as the "National Petroleum Reserve-Alaska Integrated Activity Plan/EIS," which stated, "is designed to determine the appropriate management of all BLM-managed lands in the [Reserve]." Under the heading, "What is BLM proposing to do in this plan?" the Executive Summary stated that BLM completed the combined IAP and EIS "to determine the appropriate management of the BLM-administered lands (public lands) in the nearly 23-million-acre Petroleum Reserve." It highlighted that "[a]mong the most important decisions the BLM will make through this plan is what lands should be made available for oil and gas leasing and with what protections for surface resources and uses."

As relevant here, it says only that "[t]he plan will examine a range of alternatives for oil and gas leasing and development." We find all these high-level summaries are ambiguous as to whether the "proposal which is the subject of" the EIS is merely to designate certain lands as available for leasing, with actual lease sale decisions to be proposed and analyzed at a later point, or if the subject proposals include the actual offerings and sales of the leases.16 40 C.F.R. § 1502.4(a).

However, a section of the Introduction regarding "Requirements for Further Analysis" provided somewhat greater guidance. This section stated that "BLM anticipates that this IAP/EIS will fulfill the NEPA requirements for the first oil and gas lease sale." As to future lease sales, it states that "[p]rior to conducting each additional sale, the agency would conduct a determination of the existing NEPA documentation's adequacy. If the BLM finds its existing analysis to be adequate for a second or subsequent sale, the NEPA analysis for such sales may require only an administrative determination of NEPA adequacy." It then contrasts future "actions," such as a "proposed exploratory drilling plan," which "would require further NEPA analysis" based on the specifics of the proposal.

By stating that future lease sales might require only an "administrative determination of NEPA adequacy," as opposed to "further NEPA analysis," this section implies that future leases are within the scope of the 2012 EIS. A DNA could suffice only if the relevant question was whether the lease sale required a supplemental EIS. *See Idaho Sporting Congress Inc. v. Alexander*, 222 F.3d 562, 566 (9th Cir. 2000) (recognizing a "limited role" for non-NEPA evaluation procedures "for the purpose of determining whether new information or changed circumstances require the preparation of a supplemental EA or EIS").

Of note, this section does not describe future lease sales as future "actions" – thus, it implies that future lease sales are components of the action that is the subject of the 2012 EIS. Finally, this section claimed that the 2012 EIS will entirely fulfill the NEPA requirements for the first lease sale suggests that all lease sales are within the scope of the subject action, with the only potential trigger for additional NEPA

analysis being new information or circumstances arising before subsequent sales—i.e., factors potentially requiring supplementation. *See* 40 C.F.R. § 1502.9(c).

The Ninth Circuit stated that if NRDC challenged the 2012 EIS in a timely manner, they could have argued that NEPA required consideration of a reasonable alternative authorization of multiple lease sales that employed particular criteria regarding how many and which tracts to offer when. *See Kempthorne*, 457 F.3d at 978. The court offered that although the expressly defined scope of the 2012 EIS is somewhat ambiguous as to the question, it found that the language regarding future NEPA requirements provides reasonable notice that the intended scope encompassed the actual lease sales. The Ninth Circuit deferred to BLM's reasonable position that the 2012 EIS was the EIS for the 2017 lease sale.

NRDC's first and third claims failed on the merits. The 2017 lease sale offering did not require a new tiered or stand-alone NEPA analysis. Because the court concluded that the 2012 EIS was the EIS for the 2017 lease sale, NRDC's second claim, alleging that BLM failed to take a hard look at the impacts of the 2017 lease sale, is time barred in part and waived in the remainder. The court noted that because NRDC did not assert (or "disavowed") a supplementation claim, the Ninth Circuit considered this issue waived.

Center for Biological Diversity v. Bernhardt, 982 F.3d 723 (9th Cir. 2020)
Agency prevailed on one NEPA claim but did not prevail of second NEPA claim.

Issues: Alternatives, Impact Assessment (Indirect impacts (GHG)).

Facts: Environmental organizations (collectively, CBD) petitioned for review of BOEM's approval of an 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. The Ninth Circuit granted in part and denied in part the Petition for Review. BOEM's approval of project was vacated and remanded

Hilcorp Alaska, LLC, was an energy management company seeking to produce crude oil from Foggy Island Bay, along the coast of Alaska in the Beaufort Sea. To extract the oil from under the Beaufort Sea, Hilcorp will need to construct an offshore drilling and production facility. The facility—referred to as "the Liberty project," -- will be the first oil development project fully submerged in federal waters. Hilcorp estimates that the site contains about 120 million barrels of recoverable oil, which it hopes to extract over the course of fifteen to twenty years.

The site of the Liberty project is within the outer Continental Shelf of the United States and thus governed by the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1331 et seq. OCSLA allows the BOEM to oversee the mineral exploration and development of the outer Continental Shelf. Administering the use of the Shelf under OCSLA may include leasing federal land for oil and gas production to entities like Hilcorp. *See* 43 U.S.C. §§ 1344; 1331(c), (k)–(m). OCSLA requires BOEM to manage the outer Shelf in "a manner which considers [the] economic, social, and environmental values" of the Shelf's natural resources. 43 U.S.C. § 1344(a)(1). Before Hilcorp can begin drilling, it must obtain approval of the project from BOEM. BOEM completed an EIS and BOEM's Regional Supervisor of Leasing and Plans signed a ROD approving the Liberty project.

Decision: CBD argued that BOEM's EIS was arbitrary and capricious under the APA because BOEM improperly (1) relied on different methodologies in calculating the lifecycle greenhouse gas emissions produced by the no-action alternative and the other project alternatives, thus making the options incomparable, and (2) failed to include a key variable (foreign oil consumption) in its analysis of the no-action alternative.

The Ninth Circuit disagreed with CBD's argument that BOEM unlawfully used different methodologies to calculate the greenhouse gas emissions resulting from the Liberty project and the no-action alternative. It pointed out the record indicated that BOEM did not apply different methods in comparing the action and the no-action alternatives. In its final EIS, BOEM considered various alternatives: the Proposed Action (the Liberty project), other action alternatives (each of which propose different strategies, locations, or other modifications of the Proposed Action), and the no-action alternative, in which BOEM analyzed the effects of not leasing the land at all. To calculate the emissions for each of the action alternatives, BOEM calculated both the "upstream" and the "downstream" emissions.

BOEM then summed the two types of emissions, resulting in a "lifecycle greenhouse gas emissions" estimate for each alternative. To facilitate comparisons across the action alternatives, the total lifecycle emissions for each proposed plan were converted to metric tons of "carbon dioxide equivalents"—even though emissions would include methane, nitrous oxide, and other greenhouse gases.

The lifecycle greenhouse gas emissions for the no-action alternative were not calculated by directly summing its upstream and downstream emissions. The upstream emissions for the no-action alternative are, clearly, zero. The direct downstream emissions of the no-action alternative are zero, but—as BOEM recognized—its indirect downstream emissions may be much higher. Not drilling at the proposed site may cause global oil supply to fall, demand to rise, and, as a result, require drilling and oil extraction elsewhere.

To capture these indirect downstream emissions, BOEM used a market-simulation model to predict the greenhouse gas emissions for energy sources that would substitute for the oil not produced at Liberty.
In response to CBD's claims, BOEM could have used the market simulation model to offset the emissions calculated under each of the action alternatives and then compared it to zero, the lifecycle emissions produced by the no-action alternative. Summing all emissions from the proposed project assumes that, if Liberty is developed, there would be no need for the other sites to satisfy demand under the no-action alternative. The total numbers would be different, but the absolute differences between them would be the same. Both methods of calculation result in net—not gross—emissions. The analysis is ultimately a relative comparison, sufficient for making a "reasoned choice among alternatives." 40 C.F.R. § 1502.22(a). The court concluded that BOEM did not arbitrarily and capriciously apply a different method of calculation in estimating the emissions from the action and no-action alternatives.

However, the Ninth Circuit agreed with CBD's second argument -- that BOEM arbitrarily failed to include emissions estimates resulting from foreign oil consumption in its analysis of the no-action alternative. In its EIS, BOEM concluded that the Proposed Action and the action alternatives would each produce about 64,570,000 metric tons of carbon dioxide equivalents. It then estimated that the no-action alternative would produce—somewhat perplexingly—89,940,000 metric tons of carbon dioxide equivalents, 25,370,000 more metric tons than if the land were leased under any scenario. The EIS explained that the no-action alternative will result in more emissions because the oil substituted for the oil not produced at Liberty will come from places with "comparatively weaker environmental protection standards associated with exploration and development of the imported product and increased emissions from transportation." CBD explained that BOEM reached this counterintuitive result by omitting a key variable in its analysis: foreign oil consumption.

Understanding why foreign oil consumption is critical to BOEM's alternatives analysis requires some basic economics principles. If oil is produced from Liberty, the total supply of oil in the world will rise. Increasing global supply will reduce prices. Once prices drop, foreign consumers will buy and consume more oil. The model used by BOEM assumes that foreign oil consumption will remain static, whether or not oil is produced at Liberty.

This omission, according to CBD, makes BOEM's analysis "misleading" because it fails to capture the emissions caused by increased global consumption in its estimate of Liberty's downstream emissions. BOEM acknowledges that the no-action alternative will cause foreign oil consumption to decline; the EIS estimates that the no-action alternative will result in a reduction in oil consumption of one, four, or six billion barrels of oil, depending on the market price of oil. But the impacts on greenhouse gas resulting from such reductions in oil consumption "are not captured" in the EIS because BOEM determined it did not have sufficiently "reliable information on foreign emissions factors and consumption patterns."

The Ninth Circuit agreed with CBD that BOEM was both required and able to estimate the variable and include its effect. In *Sierra Club v. Federal Energy Regulatory Comm'n*, 867 F.3d 1357 (D.C. Cir. 2017), for example, the D.C. Circuit concluded that the FERC had unlawfully conducted its EIS for a natural gas pipeline project because it failed to quantify the indirect greenhouse gas emissions that would result from the burning of the natural gas transported by the pipelines. *Id*. at 1374. The agency should have "either given a quantitative estimate of the downstream greenhouse emissions," or "explained more specifically why it could not have done so." *Id*. Greenhouse gas emissions were an indirect, reasonably foreseeable consequence of the pipeline,

and FERC's justification for its omission—that "emission estimates would be largely influenced by assumptions rather than direct parameters about the project" — was unsatisfactory. *See WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 68 (D.D.C. 2019) (determining that an agency's assertion that "quantifying [greenhouse gas] emissions . . . would be overly speculative" was "belied by an administrative record replete with information on oil and gas development and [greenhouse gas] emissions").

BOEM refers to the omission of foreign oil consumption in two separate pages of the final, 600-page EIS. The first is in Appendix B of the EIS, in response to public comments expressing concern over the omission of foreign oil consumption. BOEM responds only that "[c]ontext suggests that any change in foreign oil consumption resulting from the pending decision on the Liberty DPP would be very small," and because "Liberty DPP represents a very small fraction of the amount of oil comprising the global market," it "could only have a negligible impact on worldwide oil prices and, as a result, only a negligible impact on foreign consumption and emissions levels." It adds that "[e]ven if BOEM could reliably estimate these marginal differences (which it cannot, given the lack of reliable information on foreign emissions factors and consumption patterns), such estimates would not change the end results of BOEM's analysis to a meaningful extent." BOEM cites to no evidence in support of these conclusions and does not provide any further explanation for the omission.

Appendix B then refers readers to a general report, incorporated by reference into the EIS, that describes the market-simulation model and its limitations. The relevant portion of that report explains that "[e]xcluding the foreign oil and gas markets is reasonable" because "[o]il consumption in each country is different, and BOEM does not have information related to which countries would consume less oil." BOEM does not cite any materials in support of these statements nor describe the research it relied upon to reach these conclusions. This is insufficient to satisfy NEPA's requirements.

Emissions resulting from the foreign consumption of oil are surely a "reasonably foreseeable" indirect effect of drilling at Liberty, just as foreseeable as the emissions resulting from the consumption of oil produced at sites other than Liberty, which the market-simulation model already considers. Even if the extent of the emissions resulting from increased foreign consumption is not foreseeable, the nature of the effect is.

Various studies provided by CBD in the administrative record confirm the effect of increasing domestic oil supply on foreign consumption and the feasibility of its estimation. In one study, the Stockholm Environment Institute—noting that BOEM omitted the same calculation in its analysis of the effects of the Keystone Pipeline—demonstrates how an increase in foreign oil consumption translates into greenhouse gas emissions.

Using a "simple calculation," relying on parameters publicly provided in BOEM's report, the Institute calculates the expected resultant greenhouse gas emissions from increased foreign consumption of oil. It concludes that developing the Pipeline would cause an increase in global oil consumption ten times greater than the increase in domestic consumption forecasted by BOEM. Other studies in the record confirm the same: domestic consumption impacts foreign oil consumption and increases in foreign oil consumption can be translated into estimates of greenhouse gas emissions.

BOEM's conclusion that not drilling will result in more carbon emissions than drilling is counterintuitive. The court noted that in some cases quantification may not be feasible. But even if BOEM was unable to quantitatively evaluate the emissions generated by foreign countries in the absence of the Liberty project, it still must thoroughly explain why such an estimate is impossible.

The court reviewed 40 C.F.R. 1502.22 and determined that the regulation required the agency to include a statement explaining that the information is lacking, its relevance, a summary of any existing credible evidence evaluating the foreseeable adverse impacts, and the agency's evaluation of the impacts based upon "theoretical approaches or research methods generally accepted in the scientific community." 40 C.F.R. § 1502.22(b)(1).

The EIS's two-page explanation of BOEM's decision to omit foreign oil emissions is insufficient to meet these requirements. BOEM did not summarize existing research addressing foreign oil emissions nor attempt to estimate the magnitude of such emissions. It cannot ignore basic economics principles and state—without citations or discussion—that the impact of

the Liberty project on foreign oil consumption will be negligible. In short, the EIS "should have either given a quantitative estimate of the downstream greenhouse gas emissions" that will result from consuming oil abroad, or "explained more specifically why it could not have done so," and provided a more thorough discussion of how foreign oil consumption might change the carbon dioxide equivalents analysis.

BOEM has the statutory authority to act on the emissions resulting from foreign oil consumption. If it later concludes that such emissions will be significant, it may well approve another alternative included in the EIS or deny the lease altogether. *Cf. Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 766–68, 770, 124 S.Ct. 2204, 159 L.Ed.2d 60 (2004). Here, the Ninth Circuit agreed with CBD that BOEM's alternatives analysis in the EIS was arbitrary and capricious.

Rivers v. Bureau of Land Mgmt., No. 19-35384, 815 Fed. Appx. 107 (9th Cir. May 15, 2020) (not for publication)
Agency prevailed.

Issues: Cumulative Impacts, Supplementation

Facts: Pacific Rivers challenged BLM's revisions to its 1995 resource management plans (RMPs) involving 2.5 million acres of forest in Western Oregon. The 1995 RMPs were consistent with BLM's adoption of the 1994 interagency Northwest Forest Plan, which included a detailed Aquatic Conservation Strategy ("ACS") to protect fish habitat and related ecosystems.

In 2016, after a four-year revision process involving thirty-eight public outreach events, input from local, state, and federal governmental entities, and consultation with nine federally recognized Indian tribes, BLM issued updated RMPs and an EIS. NMFS concurrently issued a Biological Opinion concluding that the 2016 RMPs were "not likely to jeopardize" endangered or threatened species or critical habitat.

The Ninth Circuit affirmed the lower court's grant of summary judgment in favor of the agency.

Decision: The Ninth Circuit held that the EIS was not legally deficient because its cumulative effects analysis did not assess how the 2016 RMPs might affect future unspecified conduct by private landowners in the Western Oregon checkerboard (as Pacific Rivers alleged). *See* 40 C.F.R. § 1508.7.

It similarly rejected the claim that the cumulative effects assessment was inadequate. BLM analyzed the cumulative effects of the 2016 RMPs in the aggregate, varying the scope of its analysis by resource. BLM considered the effects of reasonably foreseeable events on privately-owned land based on current management conditions and was not required to speculate about unspecified future actions. *Jones v. Nat'l Marine Fisheries Serv*., 741 F.3d 989, 1000 (9th Cir. 2013). BLM thus reasonably took the required "hard look" at the consequences of the 2016 RMPs.

The court rejected the claim that the EIS represented a change in agency policy; BLM updated the 1995 RMPs based on "new data, new or revised policy and changes in circumstances." 43 C.F.R. § 1601.5–6; *see also* 43 C.F.R. §§ 1601.0–1, 1601.0–2, 1601.0–8; 43 U.S.C. § 1712(a). The EIS described the history of the Northwest Forest Plan, explained the need for revising the 1995 RMPs, and commented on potential substantive concerns. BLM thus provided a "reasoned explanation" for any change in its management approach.

Friends of Animals v. Silvey, No. 18-17415, 820 Fed. Appx. 513 (9th Cir. Jul. 2, 2020) (not for publication)
Agency prevailed.

Issues: Significance of Impacts

Facts: A wildlife advocacy organization, Friends of Animals (Friends) challenged BLM's approved plan, the Antelope and Triple B Complexes Gather Plan (Gather Plan) to gather, round-up, and permanently remove approximately 9,000 wild horses from two wild horse complexes. The Ninth Circuit affirmed the lower court's grant of summary judgment in favor of the agency.

Decision: Friends claimed BLM should have prepared an EIS instead of an EA. The Ninth Circuit held that BLM's decision not to prepare an EIS because of the boundary correction was not arbitrary and capricious. BLM satisfied the "hard look" standard regarding the effects of releasing geldings back to the range. The EA provided a thorough review of the research on the gelding procedure and of studies on the effects of gelding on domesticated and semi-feral horses, on the effects of castration on other species, and on the natural social behavior of wild horses. Although BLM did not address the National Academy of Sciences

Report directly, it provided a "reasoned evaluation of the relevant factors." BLM acknowledged the uncertainty that the report identified and discussed the evidence of potentially adverse effects of gelding. BLM also addressed the factors raised by experts who submitted public comments and provided a reasonable explanation for not relying on their opinions. BLM made "reasonable predictions on the basis of prior data" to conclude that there would be no significant environmental impact. *Ctr. for Biological Diversity v. Kempthorne*, 588 F.3d 701, 712 (9th Cir. 2009).

BLM also satisfied the hard-look standard regarding the effects of the Gather Plan on genetic diversity. The Gather Plan complied with BLM's guidelines. It included a process to continue to monitor and assess diversity and to mitigate concerns about genetic diversity. Additionally, in the EA, BLM discussed the effects of gelding and the administration of immunocontraceptives on genetic diversity. Because unique genotypes are not at issue here and because most herds have high genetic variability, BLM considered the necessary factors to satisfy the hard-look standard. *Cf. Friends of Animals v. U.S. Bureau of Land Mgmt.*, No. 16-cv-0199, 2017 WL 5247929, at *8 (D. Wyo. Mar. 20, 2017) (concluding that BLM had sufficiently addressed the concern of general genetic variability, but that it had not adequately discussed the effects on a unique genotype).

The court held that BLM's choice to conduct a continuous removal of geldings through a phased-gather approach was not arbitrary or capricious. BLM's use of a single gather plan and a single EA to cover a period of years and a series of individual gather operations was not a departure from the agency's past practice. It found the statements in the land-use plans and guidebook were not in conflict with BLM's decision because BLM used the term "gather" to refer to both individual gather operations and gather plans.

Finally, the Ninth Circuit held BLM's choice did not conflict with litigation positions that BLM has taken in the past. *In Friends of Animals v. Haugrud*, 236 F. Supp. 3d 131 (D.D.C. 2017), BLM argued that the plan at issue authorized a single roundup only and that additional EAs would be required before conducting any other roundups. *Id.* at 134–35. BLM did not take the position, however, that plans can never authorize multiple roundups. Because the Gather Plan does not reflect a policy change, the APA did not require BLM to provide an explanation.

Chilkat Indian Village of Klukwan v. Bureau of Land Mgmt., No. 19-35424, 825 Fed. Appx. 425 (9th Cir. Aug. 28, 2020) (not for publication)
Agency prevailed.

Issues: Connected Action, Cumulative Impacts.

Facts: Environmental organizations and the Chilkat Indian tribe (collectively, Chilkat) challenged BLM's approval of applicant mining companies' operations plans for hard rock mineral exploration on a large parcel of public land in southeastern Alaska (the Palmer Project.). The Ninth Circuit affirmed the lower court's grant of summary judgment in favor of the agency.

Decision: The Ninth Circuit rejected Chilkat's contention that NEPA's timeliness provisions required BLM to consider the environmental impacts of the future development of a mine on the Palmer Project prior to approving the mining companies' exploration plans. Chilkat contended that, by approving the operations plans, BLM will lose its authority to preclude mining companies from developing hard rock mineral mines on the Palmer Project. More specifically, Chilkat argued that BLM would no longer be able to petition the Secretary of the Interior to exercise his authority under the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701–1787, to withdraw Palmer Project lands from operation of the General Mining Act of 1872, 30 U.S.C. §§ 22–54.

The Ninth Circuit disagreed with Chilkat, stating the record in this case contained insufficient evidence to conclude that BLM's commitment is either "irreversible" or "irretrievable." The court did not conclude that BLM's approval amounts to an "irreversible and irretrievable commitment" of Palmer Project lands to future mine development. The court distinguished *Conner v. Burford*, 848 F.2d 1441, 1446, 1449, 1451 (9th Cir. 1988) (finding BLM violated NEPA by failing to consider the impacts of drilling prior to its sale of oil and gas leases under the Mineral Leasing Act of 1920, because that sale forfeited the government's ability "to prevent . . . surface-disturbing activity" and constituted an irreversible and irretrievable commitment of resources). This case involved the Mining Act, which provides a default rule that public lands "shall be free

and open to exploration and purchase" unlike the Mineral Leasing Act. 30 U.S.C. § 22. Thus, the court concluded that BLM did not violate NEPA's timeliness requirements by failing to examine the environmental impacts of a future mine on the Palmer Project.

For similar reasons, BLM did not act arbitrarily by failing to consider the impacts of future mining activity on the Palmer Project as "cumulative" to those examined in its EA. When an agency prepares an EA, "that document must consider the cumulative impacts of the action under consideration." *League of Wilderness Defs. v. Connaughton*, 752 F.3d 755, 762 (9th Cir. 2014) (citing 40 C.F.R. § 1508.7). Cumulative impacts are those impacts on the environment which result from the incremental impacts of an action when added to other past, present, and reasonably foreseeable future actions. *Id*. If the agency does not have "enough information . . . to permit meaningful consideration" and "the parameters of [a future] project [a]re unknown," we have found that the agency does not act arbitrarily by excluding those projects from its analysis of the cumulative impact. *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1014–15 (9th Cir. 2006) (citations omitted).

Chilkat did not establish any "reliable study or projection of future mining" on the Palmer Project within the record. Although the record contained some data about the mineral deposits on the Palmer Project and indicated a desire by Intervenors to ultimately develop a mine, it contained no estimate of the scale or scope of a future mine, nor a projection of future mining activity. At best, the record contains evidence amounting to general plans for expanding mining. This alone does not require a cumulative impacts analysis. Therefore, BLM did not act arbitrarily and capriciously by failing to consider the cumulative impacts of a future mine development on the Palmer Project as a reasonably foreseeable action.

Finally, BLM did not err by concluding that the development of a future mine was not a "connected action." Regulations promulgated pursuant to NEPA require that an agency consider "connected actions" within a single EA. 40 C.F.R. § 1508.25(a)(1). In evaluating whether actions are connected, "[w]e apply an 'independent utility' test to determine whether multiple actions are so connected as to mandate consideration in a single [EA]." *Sierra Club v. Bureau of Land Mgm't*, 786 F.3d 1219, 1226 (9th Cir. 2015). The critical question is whether "each of two projects would have taken place with or without the other." *Id*. As the record indicates, mineral exploration projects — such as the operations plans approved by BLM — often move forward even when a mine is never developed. Moreover, at the time BLM completed the EA, the mining companies had not proposed or planned for the construction of a mine on the Palmer Project. *Thomas v. Peterson*, 753 F.2d 754, 760-61 (9th Cir. 1985) (noting that connected actions are those that are "inextricably intertwined"), *abrogated on other grounds as recognized by Cottonwood Envtl. L. Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1092 (9th Cir. 2015) (finding an action "connected" when the record revealed it was at "an advanced stage of planning"). The court found that BLM did not act arbitrarily by failing to consider those future impacts within a single EA.

Natural Res. Def. Council v. Bernhardt, No. 19-35006, 820 Fed. Appx. 520 (9th Cir. Jul. 9, 2020) (not for publication)[7]
Agency prevailed.

Issues: Alternatives, Impact Assessment (Greenhouse Gas Impacts), Supplementation

Facts: Natural Resources Defense Council and other environmental organizations (collectively, NRDC) challenged BLM's 2016 and 2017 oil and gas lease sales in the National Petroleum Reserve-Alaska (the Reserve). The district court found NRDC's claims time barred by the Naval Petroleum Reserves Production Act (NPRPA), 42 U.S.C. § 6506a(n)(1).[8] The Ninth Circuit affirmed the lower court's grant of summary judgment in favor of the agency.

Decision: NRDC claimed that BLM failed to comply with NEPA, 42 U.S.C. § 4332, for its 2016 and 2017 oil and gas lease sales in the Reserve. NRDC alleged that BLM failed to take a "hard look" at the potential greenhouse gas emissions that would result from the sales and failed to develop or analyze alternative

[7] Issued on the same set of facts as *Northern Alaska Envtl. Ctr. v. U.S. Dep't of the Interior*, 983 F.3d 1077 (9th Cir. 2020).

[8] This paper examines this case, even though NRDC's claims were ultimately time-barred, because the discussion on whether future lease sales are contemplated by the original EIS documents contain substantive opinion.

lease sale configurations. *See Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97, 103 S.Ct. 2246 (1983).

The Ninth Circuit concluded that 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. It found that NRDC's comments on the 2012 EIS suggested that NRDC understood the 2012 EIS to cover future lease sales but simply thought it did so inadequately. 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 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.

The Ninth Circuit also 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 assess alternatives for the 2016 and 2017 lease sales.

It also rejected NRDC's argument that the 2012 EIS could not have been the NEPA analysis for the 2016 and 2017 lease sales because it was prepared for the management plan stage of oil and gas development, as opposed to the lease sale stage. *Northern Alaska Envt'l Ctr v. U.S. Dep't of the Interior (*NAEC), 965 F.3d 705, 715-716 (9th Cir. 2020), *opinion amended and superseded by*, 983 F.3d 1077 (9th Cir. 2020) (concluding that nothing in NEPA precludes an agency from conducting both levels of analysis in the same document, however styled).

The Ninth Circuit discussed that because the 2012 EIS was the EIS for future lease sales, BLM's "hard look" responsibility under NEPA was to take a hard look at environmental consequences and reasonable alternatives in the 2012 EIS. See 40 C.F.R. § 1502.1; *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350, 109 S.Ct. 1835 (1989).

The court held that NRDC's hard look claims addressed information or circumstances that were knowable at the time of the 2012 EIS, they are therefore time barred by the NPRPA statute of limitations. See 42 U.S.C. § 6506a(n)(1) (barring "judicial review of the adequacy of" an EIS concerning oil and gas leasing in the Reserve outside of a 60-day window); *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 438 F.3d 937, 944–45 (9th Cir. 2006) (quoting *Cal. Save Our Streams Council, Inc. v. Yeutter,* 887 F.2d 908, 911 (9th Cir. 1989)) (plaintiffs cannot, "through careful pleading," avoid an otherwise applicable statute of limitations).

The Ninth Circuit rejected NRDC's supplementation challenges because they waived their claims (by failing to preserve them). The court considered that if the 2012 EIS was not an EIS for the 2016 and 2017 lease sales, NRDC's waiver of a supplementation claim would not have been a sufficient basis on which to support the judgment -- rather, the proper inquiry would have been whether BLM was required to prepare a tiered EA or EIS.

Ultimately, the Ninth Circuit concluded that NRDC's claims are time barred in part by the NPRPA statute of limitations and waived in the remainder.

U.S. DEPARTMENT OF TRANSPORTATION

National Wildlife Fed'n v. Sec'y of the U.S. Dep't Transp., 960 F.3d 872 (6th Cir. 2020)
Agency prevailed.

Issue: Federal Action

Facts: The National Wildlife Federation (the Federation) challenged the Department of Transportation's approval of two oil spill response plans (from Enbridge Energy) for a pipeline spanning 641 miles beginning in Wisconsin, passing through Michigan, including under Straits of Mackinac, and across river to Canada. The case involves oil pipeline called "Line 5." For over sixty years, Line 5 carried oil across the Great Lakes region. Beginning in NW Wisconsin, the pipeline stretches into the Upper Peninsula of Michigan, takes a right turn at the Straits of Mackinac, and cuts down through the Lower Peninsula before ending in southwestern Ontario. The Clean Water Act (CWA) requires the operators of oil pipelines to submit response plans that address the risk of a potential oil spill. 33 U.S.C. § 1321(j)(5)(A)(i); 49 C.F.R. § 194.101(a). These plans must satisfy the following six criteria enumerated in the statute:

(i) be consistent with the requirements of the National Contingency Plan and Area Contingency Plans;
(ii) identify the qualified individual having full authority to implement removal actions, and require immediate communications between that individual and the appropriate Federal official and the persons providing personnel and equipment pursuant to clause (iii);
(iii) identify, and ensure by contract or other means approved by the President the availability of, private personnel and equipment necessary to remove to the maximum extent practicable a worst case discharge (including a discharge resulting from fire or explosion), and to mitigate or prevent a substantial threat of such a discharge;
(iv) (iv) describe the training, equipment testing, periodic unannounced drills, and response actions of persons on the vessel or at the facility, to be carried out under the plan to ensure the safety of the vessel or facility and to mitigate or prevent the discharge, or the substantial threat of a discharge;
(v) be updated periodically; and
(vi) be resubmitted for approval of each significant change.

33 U.S.C. § 1321(j)(5)(D). The Act also provides that the administering agency "shall . . . approve any plan" that satisfies the enumerated criteria. *Id.* § 1321(j)(5)(E)(iii). The lower court granted summary judgment in favor of the Federation.

Decision: The agencies appealed the lower court's order requiring that agencies must complete impact assessments (references as EISs in the decision) for oil spill response plans. NEPA requires federal agencies to prepare an EIS for major federal actions that will affect the environment. 42 U.S.C. § 4332(C). But like the consultation requirement, the EIS requirement does not apply to all major agency actions; it applies only to discretionary ones. *See Dep't of Transp. v. Pub. Citizen,* 541 U.S. 752, 770, 124 S.Ct. 2204 (2004). In *Public Citizen*, the Court held that an agency need not prepare an EIS for an action that it "lacks discretion to prevent." *Pub. Citizen*, 541 U.S. at 756. *Public Citizen* requires "a reasonably close causal relationship" between the environmental impact and the agency action — something akin to proximate causation. *Id*. at 767, 124 S.Ct. 2204. And when an agency lacks discretion, "the legally relevant cause" of the environmental impact, the Court explained, is not the agency's action but rather Congress's decision to limit the agency's discretion in the first place. *Id.* at 769. To sum up, the EIS requirement did not apply because the agency had "no discretion" to act otherwise.

The Sixth Circuit found the underlying factual in this case situation similar to *Public Citizen*. The CWA doesn't allow the agency to reject a response plan for "any reason under the sun." *Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs*, 941 F.3d 1288, 1298 (11th Cir. 2019). Rather, the Act requires the agency to approve any plan that satisfies the enumerated criteria. Like in *Public Citizen*, the agency does not need an EIS for "an action it [cannot] refuse to perform." *Pub. Citizen*, 541 U.S. at 769. The court found here that "the legally relevant cause" of any environmental impact isn't the agency's approval of the response plan but rather Congress's decision to limit the agency's discretion in the first place. *Id.* The Sixth Circuit stated the EIS requirement does not apply because the agency had no discretion to act otherwise. The court limited this finding by cautioning that the agency may not make free-form environmental decision but stated that the agency did not need to prepare an EIS.

The court did note that the only other circuit to address the issues reached the same result but through different reasoning. *See Alaska Wilderness League v. Jewell*, 788 F.3d 1212 (9th Cir. 2015) (holding that an agency need not comply with the NEPA before it approves a response plan; but it found the CWA ambiguous and the agency's interpretation reasonable). The Sixth Circuit reversed and remanded the lower court's grant of summary judgment in favor of the Federation.

Dissent (Circuit Judge Merritt): Judge Merritt reviewed that from 1999 to 2016 at least 269 oil spills or leaks occurred from the defendant, Enbridge Energy, resulting in over three million gallons spilled. Given the potential for environmental damage that each spill creates, Judge Merritt focused on whether the court should take a narrow or broad view of the wildlife and other environmental resources that should be protected, believing the majority took an extremely narrow view.

Judge Merritt criticized the reliance on *Pub. Citizen v. Dep't of Transp.*, 541 U.S. 752, 124 S.Ct. 2204 (2004), to support the position that the agency here did not have to prepare an EIS. In *Public Citizen*, the agency was required to certify a person as a motor carrier if it found that person willing and able to comply with safety and financial responsibility requirements established by the Department of Transportation. *See* 49 U.S.C. § 13902(a)(1)(A); *Pub. Citizen*, 541 U.S. at 76. The agency was not statutorily authorized to consider environmental concerns. The Court held that the agency need not have complied with the EIS requirement because it did not have the discretion to prevent the certifying of motor carriers based on environmental concerns, given "its limited statutory authority[.]" *Id*. at 770.

Judge Merritt differentiated *Public Citizen*: the bulk of the agency's work in this case is to determine if the pipeline operator has the necessary means to prevent, minimize, or mitigate environmental damage from a potential worst-case discharge. The agency's approval of a response plan would therefore provide what was lacking in *Public Citizen*—a "reasonably close causal relationship between the agency action and environmental effects, including a worst-case discharge, stemming from a potential spill." *Alaska Wilderness*, 811 F.3d at 1117 (Gould, J., dissenting).

Judge Merritt opined that *Public Citizen* does not control because Congress did not want the administrative agency to be captured by the oil pipeline business by rote consideration of only a narrowly defined checklist, but rather required a discretionary judgment by the administrative agency to ensure that a response plan gives protection "to the maximum extent practicable" the involves environmental resources. Judge Merritt would affirm the decision of the lower court.

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

Issue: Assessment of Impacts

Facts: Plaintiffs Bess Bair, Trisha Lee Lotus, Jeffrey Hedin, David Spreen, the Center for Biological Diversity, the Environmental Protection Information Center, Californians for Alternatives to Toxics, and Friends of del Norte (collectively, Bair) 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.

Richardson Grove State Park (the Grove) comprises approximately 2,000 acres within the redwood forests of southern Humboldt County, California, and is bisected by United States Highway 101. Within the Grove, Highway 101 is a two-lane highway "on a nonstandard alignment" with tight curves and narrow travel lanes and roadway shoulders. Several trees, including old-growth redwood trees, abut the roadway as it meanders through the Grove. Considering the antiquated roadway design, restriction exist on the types of vehicles that may travel that portion of the highway. Sixty-five foot long "California Legal" trucks are permitted, but industry-standard Surface Transportation Assistance Act of 1982 (STAA) trucks generally are not. STAA trucks are longer than California Legal trucks and can carry larger cargo volumes, although both classes of trucks are subject to the same weight limitation. Because of their longer length, STAA trucks navigating the highway's tight curves frequently "off-track" into the opposing traffic lane or onto the roadway shoulder.

The STAA truck restriction at the Grove is the only remaining impediment to STAA trucks traveling into Humboldt County via Highway 101. Caltrans has long sought to remove that roadblock, but abandoned previous efforts because of the substantial projected expense, among other things. In 2007, Caltrans learned that the existing roadway could be strategically widened to render it accessible to STAA trucks, and Caltrans developed the Richardson Grove Operational Improvement Project (the Project) to do just that. The Project involves slightly widening the roadway and straightening some curves in certain locations along a one mile stretch of Highway 101, largely within the Grove. Its purposes are to accommodate STAA truck travel, improve the safety and operation of Highway 101, and improve the movement of goods into Humboldt County. The speed limit would remain unchanged at thirty-five miles per hour.

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 (State Parks)). 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," as well as the effect on trees whose structural root zones were within the construction area. Although some trees would be removed, none of those would be old-growth redwoods. And while construction would occur in the structural root zones of fewer than 80 old-growth redwoods, plans were made to mitigate its effects. Caltrans issued the EA and FONSI for the Project in May 2010.

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'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.

Since the original issuance of the EA in 2010, Caltrans has modified the Project to reduce its impact, primarily by narrowing the proposed roadbed (roadway shoulders). The Project required the removal of 38 trees, none of which are old-growth redwoods, and construction will occur within the structural root zones of 78 old-growth redwood trees, 72 of which are within the Grove. That construction activity largely consisted of: (1) excavation to a maximum depth of two feet; 2) covering some of the root zone with impervious surface (roadbed); and (3) placing fill over tree roots.

Caltrans retained its arborist to evaluate the effects of the Project on the redwoods and to produce two reports summarizing his conclusions. In general, he determined that the Project "would not have any substantial detrimental effect on individual old-growth redwoods . . . or the overall health of the stand of redwoods in Richardson Grove." His reports were based on scientific literature regarding redwoods, his three decades of experience as an arborist, multiple site visits to the Grove (including a helicopter flight to evaluate tree crowns), and materials provided by Caltrans such as the EA, detailed schematic drawings of all trees with root zones within the Project area, and individual tree details for each. The arborist assessed each tree individually to determine the likely effect on its health from the root zone disturbances created by the Project, both with and without mitigation measures, and assigned each tree a rating corresponding to the anticipated effects on its health, ranging from Level 0 to Level 6. He concluded that the Project would not jeopardize the lives of any old-growth redwood trees, and that many of such trees would sustain no decline in foliage density or health as a result of the Project. In the absence of mitigation measures, the arborist decided that approximately eighteen old-growth redwood trees may manifest "a short-term visible reduction in foliage density that is still well within the adaptive capabilities of the tree" (Level 4 rating), while one such tree may undergo "a reduction in root health sufficient to cause lasting visible dieback of wood in the uppermost crown, although tree health and survival [would] not [be] threatened" (Level 5 rating). Including the Project's mitigation measures substantially reduced those effects: the arborist determined that only three old-growth redwood trees would remain in Level 4 and none in Level 5 if the proposed mitigation measures were implemented. The arborist concluded that "[n]one of the proposed highway alterations is of sufficient magnitude to threaten the health or stability of any old-growth redwood" because "disturbances would be confined to a small percentage of the area occupied by roots and would be well within the adaptive capabilities of the tree[s]." Moreover, even without mitigation measures, the arborist concluded that "the limited root disturbance would be inconsequential to the appearance, stability, and continued health of the old-growth redwoods in Richardson Grove."

Caltrans agreed with Yniguez's analysis, but also considered other evidence, such as scientific literature about the resilience, health, and development of redwoods and their root systems generally, the condition of the particular old-growth redwood trees in the Project area, and the specific activities and mitigation measures comprising the Project. Caltrans concluded that "[i]n no case would root disturbance have a significant detrimental effect on the health or stability of old-growth redwoods." In May 2017, Caltrans issued revisions to the EA and a new FONSI.

Bair challenged the 2017 EA and FONSI and the lower court original granted partial summary judgement against the agency. 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.

Decision: The Ninth Circuit reversed and remanded. It highlighted that Caltrans based its 2017 FONSI upon the analysis contained in the revised EA, which incorporated the analysis of the 2010 EA and the 2013 Revised Supplemental EA. Because Caltrans' 2010 EA, as supplemented and revised, constituted the "hard look" at the Project's effects required by NEPA, and that Caltrans' issuance of the 2017 FONSI was reasonable.

First, as to redwood tree suffocation, the Ninth Circuit found 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. The arborist specifically relied in part upon Caltrans' selection of permeable material, the minor and limited areas of new asphalt, and Caltrans' decision to narrow the proposed roadway shoulders where possible in reaching his conclusion that the Project would not create extreme stress in the redwoods or overwhelm their natural resilience. 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.

Second, as to construction within root 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.

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. Thus, to the extent that the recommendation in State Parks' handbook is relevant here, Caltrans could (and did) reasonably refuse to follow it, especially when Caltrans relied upon evidence specifically pertaining to the effects of construction on redwoods in general and the redwoods in the Project area.

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, particularly regarding whether they would be more numerous or generate more noise. Caltrans' EA concluded that truck traffic would not increase as a result of the Project, and it properly relied upon record evidence to do so, including: a survey of regional business owners, traffic studies in nearby areas suggesting little latent demand for the route, the fact that highway capacity would be unchanged, and Caltrans' opinion that STAA trucks currently using the straighter alignment and faster travel time of Interstate 5 to reach major coastal cities were unlikely to detour through the Grove. *See In Def. of Animals*, 751 F.3d at 1072. Caltrans reasonably concluded from that evidence that traffic would not increase because of the Project. Thus, Caltrans' conclusion that traffic would not increase (and thus, noise would not increase) is entitled to deference.

Although the district court stated that it believed STAA trucks would be noisier than California Legal trucks because their tractor units "are bigger and heavier," it cited no evidence for its assumptions about the size and weight of STAA tractor units, or its

belief about their noise in comparison to California Legal trucks. Caltrans adequately considered the Project's effects on both traffic and traffic noise in the Grove, and reasonably concluded that the impacts would not be significant.

Fourth, as to collisions with trees, the undisputed purpose of the Project is to widen the road to provide room for off-tracking STAA trucks, and Caltrans reasonably concluded that doing so would decrease the incidence of vehicles colliding with trees. Bair's assumption that the collision risk will increase because the pavement will be closer to some trees ignores that the pavement is moving farther from other trees. Caltrans' conclusions regarding the frequency of collisions were reasonable and entitled to deference, especially because they pertain to an area of agency expertise. *Nat'l Parks & Conservation Ass'n v. U.S. Dep't of Transp.*, 222 F.3d 677, 682 (9th Cir. 2000).

As to damage severity, the court found the claims unsupported by evidence in the record. It was reasonable for Caltrans' EA not to anticipate that unfounded speculation. The Ninth Circuit rejected Bair's argument that because Caltrans was responsible for drafting the EA, it was also required to amass evidence demonstrating the comparative damage caused to trees by collisions with STAA trucks and California Legal trucks. *See* 40 C.F.R. § 1508.9(a). An agency 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.

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.