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# 2023 NEPA Case Law Update \*and a few 2024\* cases

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\* Pam views do not express those of the federal government, the U.S. Dep't of Transportation, or the Federal Aviation Administration

# NEPA Litigation

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

# NEPA Remedies

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

- (1) reversing and remanding without instructions to vacate,
- (2) reversing and remanding with instructions to vacate,
- (3) equitable relief (injunction),
- (4) declaratory relief (declaratory judgment), and
- (5) mandamus.

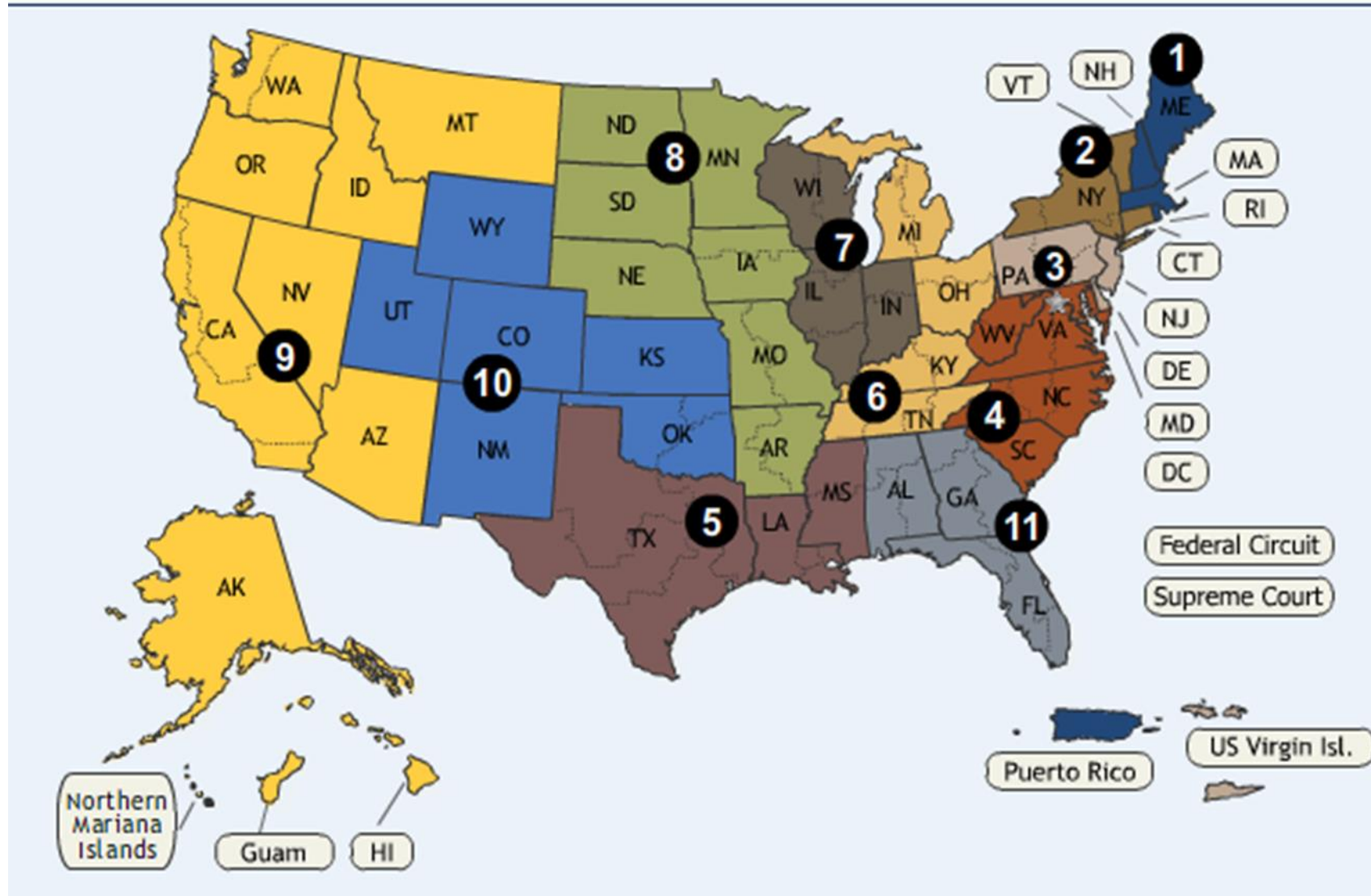
The court may also retain jurisdiction over the matter until resolved

# Federal Court System

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



# Jurisdiction of Federal Courts of Appeal



# 2023 NEPA Litigation Statistics

- U.S. Courts of Appeals issued 25 NEPA decisions (where courts reviewed NEPA documents) in 2023, 12 in the 9th, 3 each in the 10<sup>th</sup> and D.C. Circuit, and 2 each in the 5<sup>th</sup> and 7<sup>th</sup> Circuits, and 1 each in the 4th, 8th, and 11th Circuits
- 6 different agencies:
  - USDA (USFS and Rural Utilities Service) – 8 cases (prevailed in all cases but one)
  - DOI (BLM, BOR FWS, and NPS) – 6 cases (prevailed in all cases but one (and in that case agency partially prevailed)) (\*\*was co-defendant with USDA in two cases)
  - USDA (USFS) – 5 cases (prevailed in all cases but one (where it partially prevailed))
  - DOT (FAA, FHWA, STB) – 5 cases (prevailed in all cases)
  - DOD (USACE) – 3 cases (prevailed in all but one)
  - FERC – 2 cases (prevailed in one of two cases)
  - NRS – 1 case (prevailed)

Government prevailed in **76%** (**82%** if partial counted) of the cases

# Comparison to Previous Years

|                   | 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    |
| 2021              | 1                               | 1   |     | 2   |     |     | 1   |     | 6   | 2    |      | 5    | 18    |
| 2022              |                                 |     |     | 2   |     | 1   | 1   |     | 15  | 2    | 1    | 5    | 27    |
| 2023              |                                 |     |     | 1   | 2   |     | 2   | 1   | 12  | 3    | 1    | 3    | 25    |
| <b>TOTAL</b>      | 10                              | 9   | 7   | 10  | 12  | 14  | 10  | 7   | 210 | 37   | 14   | 63   | 413   |
| <b>Proportion</b> | 2%                              | 2%  | 2%  | 5%  | 3%  | 4%  | 2%  | 2%  | 51% | 8%   | 4%   | 15%  | 100   |

# 2023 Case Trends

- 25 cases total
  - 3 cases – CATEX (prevailed in two of three cases)
  - 11 cases – EAs (prevailed in all but three cases (in one of those three, the agency partially prevailed))
  - 11 cases – EISs (prevailed in all but two cases where they partially prevailed in both)



# 2023 Case Trends

- 21 (of 25) cases involved challenges to impact analysis
  - 3 cases, CATEX
  - 21 cases - direct impacts
  - 6 cases - indirect impacts (GHG)
  - 9 cases - cumulative impacts

Note: Several cases involved challenges in multiple categories.

# 2023 Case Trends

- 9 cases involved challenges to cumulative impact assessment
  - Presented by Dr. Michael Smith

# 2023 Case Trends (con't)

- 9 cases involved challenges to the sufficiency of the alternatives considered, and the courts upheld the agencies' selection of the preferred alternative in each case except for one.
- 3 cases alleged that a supplemental statement should have been completed.

# 2023 Case Trends – Alternatives

- *No Mid-Currituck Bridge-Concerned Citizens v. North Carolina Dep't of Transp.*, 60 F.4th 794 (4th Cir. 2023) (upholding the selection of alternative when the agency evaluated the relative benefits of the bridge project, the no-build alternative, and the existing-roads alternative in relieving this congestion; these analyses revealed that the bridge project still offered the most benefits overall, especially on summer weekends, and it would continue to fulfill its hurricane-evacuation purpose)
- *City of Los Angeles, California v. Federal Aviation Administration*, 63 F.4th 835 (9th Cir. 2023) (holding that the FAA considered a reasonable range of alternatives when the FAA drafted an adequate purpose and need statement and then narrowed the range of alternatives for detailed study based on rational considerations)
- *Center for Biological Diversity v. Federal Energy Regulatory Commission*, 67 F.4th 1176 (D.C. Cir. 2023) (disagreeing with plaintiff's argument that FERC should have selected the no action alternative, and finding that in the EIS, Authorization Order, and Rehearing Order, FERC considered and reasonably rejected the no-action alternative; the D.C. Circuit also stated the agency does not need to provide the same level of detailed analysis for each alternative that it provides for the action under review)

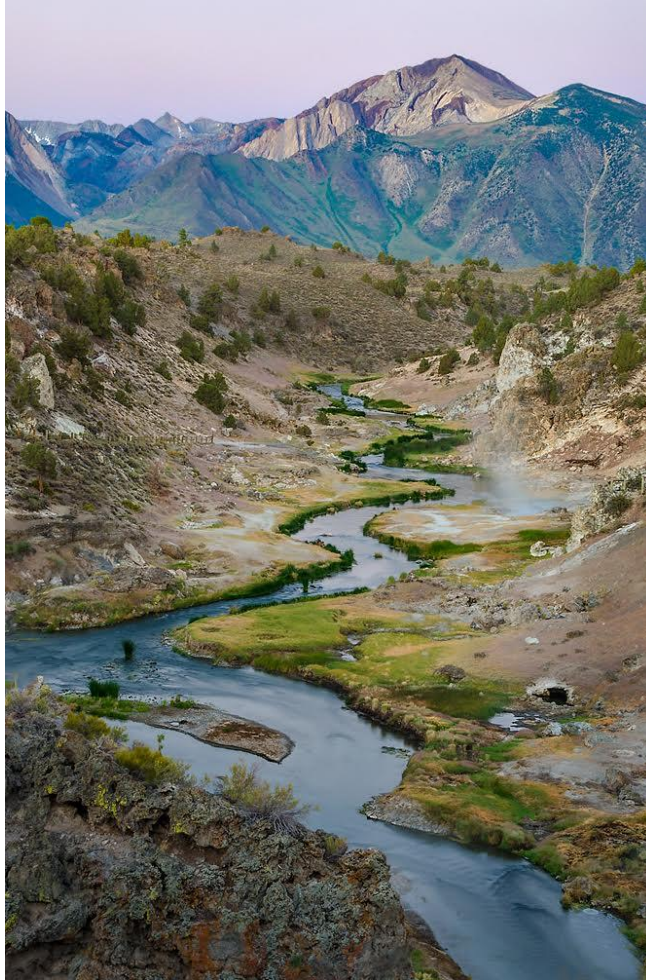
# 2023 Case Trends – Alternatives

- *Center for Biological Diversity v. U.S. Dep't of Interior*, 72 F.4th 1166 (10th Cir. 2023) (affirming that the “No Action” alternative provided an appropriate baseline for comparing the impacts of the proposed action)
  
- *Missouri ex rel. Bailery v. U.S. Dep't of Interior, Bureau of Reclamation*, 73 F.4th 570 (8th Cir. 2023) (concluding, in a brief decision, that BOR sufficiently assessed the project's environmental impacts, and that limiting the analysis to a "no action" alternative was appropriate given the minimal environmental effects of the project)
  
- *National Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 75 F.4th 743 (7th Cir. 2023) (opining that it was not unreasonable for the Corps, in narrowing its alternatives, to eliminate from consideration certain alternatives that would require Congressional action, and that it was reasonable for the Corps to reject an alternative that would propose ecological restoration as an authorized project purpose)

# 2023 Case Trends – Alternatives

- *Earth Island Institute v. U.S. Forest Serv.*, 87 F.4th 1054 (9th Cir. 2023) (holding that Earth Island's suggested alternatives were not “significantly distinguishable” from the action alternative the USFS considered and are therefore unreasonable)
- *North Cascades Conserv. Council v. U.S. Forest Serv.*, No. 22-35430, 2023 WL 2642930 (9th Cir. Mar. 27, 2023) (not for publication) (finding that the USFS considered a range of reasonable alternatives (ten), and that the alternatives that Appellants argued the USFS should have considered in greater depth would “extend beyond those reasonably related to the purposes of the project.”)
- *Neighbors of the Mogollon Rim, Inc. v. U.S. Forest Serv.*, No. 22-15259, 2023 WL 3267846 (9th Cir. May 5, 2023) (not for publication) (opining that the agency did not consider a reasonable range of alternatives when the EA considered only a “no-grazing” alternative and the proposed action, and the agency rejected Neighbors’ proposed alternative because it would not advance the purpose and need of the project)

# Categorical Exclusions: *Friends of the Inyo v. USFS*, 103 F.4th 543 (9th Cir. 2024) (Agency Did Not Prevail)



Proposed Action:  
Approval of Long Valley  
Exploration Drilling  
Projects in Inyo NF, east  
of Mammoth Lakes

- 12 drilling pads
- 1 year or less
- Monitoring up to 3 years (if habitat restoration needed)

# *Friends of the Inyo, Con't*

## The two CEs at issue:

CE-6 allows “[t]imber stand and/or wildlife habitat improvement activities that do not include the use of herbicides or do not require more than 1 mile of low standard road construction,” 36 C.F.R. § 220.6(e)(6) (“CE-6 (habitat improvement)”); and

CE-8 allows “[s]hort-term (1 year or less) mineral, energy, or geophysical investigations and their incidental support activities that may require cross-country travel by vehicles and equipment, construction of less than 1 mile of low standard road, or use and minor repair of existing roads,” *Id.* § 220.6(e)(8) (“CE-8 (mineral operations less than 1 year)”).

- USFS Regs state: “A proposed action may be categorically excluded . . . only if there are no extraordinary circumstances related to the proposed action and if: (1) The proposed action is within one of the categories established by the Secretary at 7 CFR part 1b.3; or (2) The proposed action is within a category listed in § 220.6(d) and (e).



# Friends of the Inyo, Con't

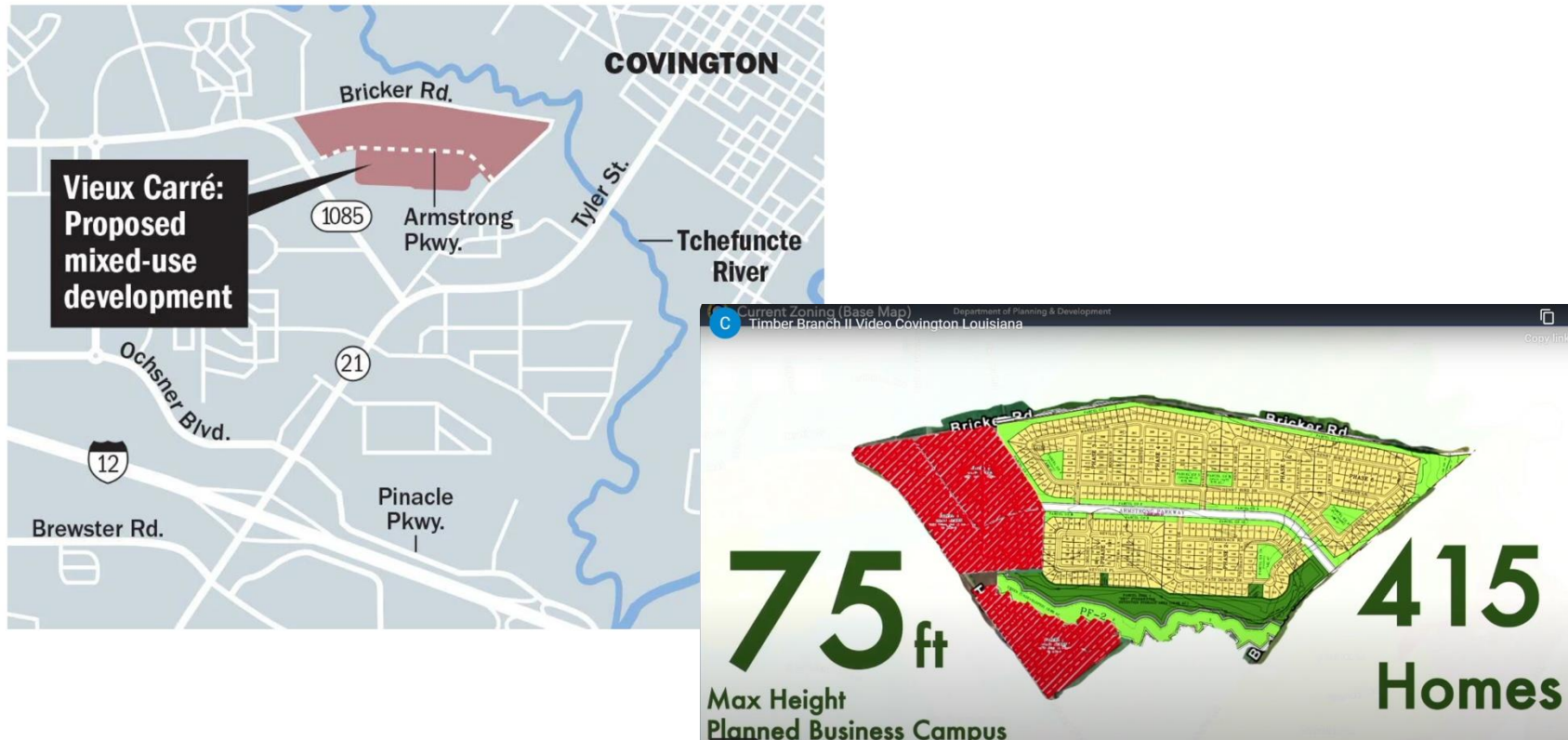
- The agency evaluated the two-phase Project as a single proposed action. USFS regulations prohibit artificially bifurcating reclamation from a proposed plan of operations.
- But because the monitoring took it out of the 1 year limit a single CE could not be used.
- Ninth Circuit: In 1991, when USFS CEs established, drafters clearly intended for the Forest Service to consider each CE independently. *See id.*; 36 C.F.R. § 220.6(e). Allowing the Forest Service to combine CEs after the fact would undermine this effort.
- Ninth Circuit: the structure of [§ 220.6](#) shows that CEs cannot be combined, where one CE alone cannot cover a proposed action. Each CE is separately defined by the Section, and many include time and space limitations that would be futile if they could be duplicated or combined. *E.g.*, [36 C.F.R. § 220.6\(e\)\(3\)](#)

# Friends of the Inyo, Con't

- Somewhat Heated Dissent:
  - Harmless error given that this project would disturb less than an acre of land and no one has identified any significant impact on the environment, any error made by the Forest Service was harmless
  - a CE is appropriate if “[t]he proposed action is within a category listed in § 220.6(d) and (e).” *Id.* § 220.6(a)(2) and compared with 2019 USFS proposed regulations (clarified category to categories and allowed more than one category to be used) that were not implemented
  - But recommended USFS separate the proposed actions rather than combining CEs and would have survived review.
  - Is this the independent utility argument?
  - “We do not just freely vacate agency decisions at the slightest inkling of error.”
  - In analyzing the project for any “extraordinary circumstances” under § 220.6(a)(2), the USFS extensively evaluated the project's impact on the Inyo's wildlife, botany, water, noise, and cultural heritage. It concluded none existed – no potential for significant impact.

***O'Reilly v. All State Financial Co., No. 22-30608, 2023 WL 6635070*** (5<sup>th</sup> Cir. Oct. 12, 2023) (not for publication)

*U.S. Army Corps of Engineers did not prevail*



Plaintiffs appeal district court's affirmation of the Corps' decision to permit a 24.58-acre wetland development in St. Tammany Parish, Louisiana.

The court reversed the district court's decision due to the Corps' inadequate EA.

## ***O'Reilly, (cont.)***

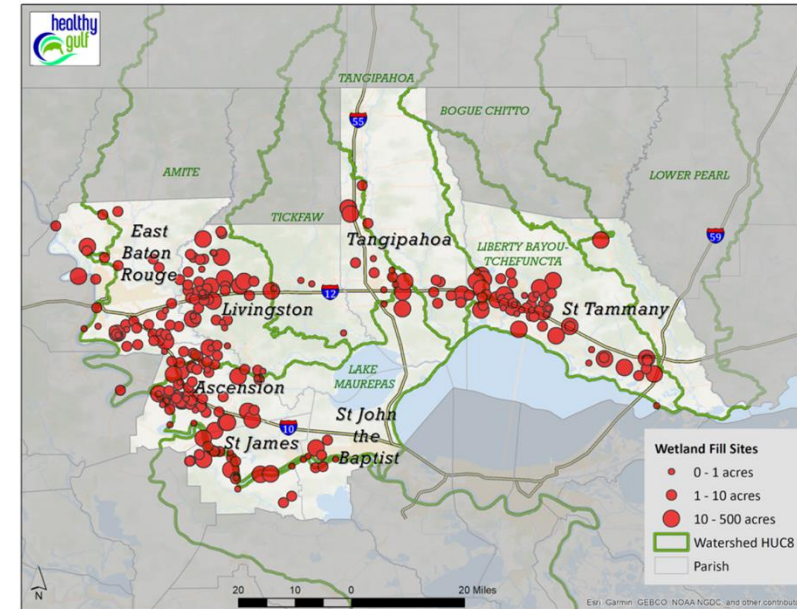
### Proposed Action:

- All State applied for a wetlands permit under CWA section 404.
- Timber Branch II multiuse commercial/residential development.
- Total development acreage:  
69.19 forested acres, wetlands 24.58 acres  
= about 22 football fields.
- Adjacent to 2 rivers and in flood hazard area.

## *O'Reilly, (cont.)*

Decision → Against USACE

- The EA did not sufficiently consider the project's direct, indirect, and cumulative impacts.
- The Corps failed to explore reasonable alternatives or justify its decision not to prepare an EIS.
- Importance of a thorough review highlighted due to the project's potential significant environmental effects.



## ***O'Reilly, (cont.)***

### Cumulative Impact Analysis:

- 80+ Permits in 5 Years:
  - Highlighting the frequency and proximity of related environmental permits.
- Incremental Impact Illustration:
  - Demonstrates the additive effect of minor impacts; "seven plus zero is still seven, seven plus eight (0.1 times 80) is fifteen."
- Public Comments Raised Projects:
  - EA didn't include cumulative projects that were raised by several public comments.



***Eagle County, Colorado v. Surface  
Transportation Board***, 82 F.4th 1152 (D.C.  
Cir. 2023) (Agency Did Not Prevail)

Proposed Action:

The construction and operation of a new rail line in the Uinta Basin in Utah.

The Surface Transportation Board (Board) authorized the proposed project.

EIS issued by Board in August 2021.



# ***Eagle County, Colorado, Con't***

## Proposed Action

- The construction and operation of an 80-mile rail line in Utah.
- The rail line would connect the Unita Basin to the rail network in Kyune, Utah.
- The Unita Basin is a 12,000 square mile area in NE Utah & NW Colorado.
- Area contains extensive, valuable mineral deposits.



# ***Eagle County, Colorado, Con't***

## NEPA/Cumulative Impact Challenges

- The Board failed to take a hard look at the Railway's environmental impacts.
- The Board should have considered environmental risks under NEPA.
- The Board should have consulted Petitioners on potential impacts to downline historic properties.
- The Board mischaracterized increased oil production environmental consequences as cumulative effects instead of indirect effects.

# ***Eagle County, Colorado, Con't***

## NEPA/Cumulative Impact Challenges (cont.)

- The Board limited its cumulative impact analysis re: vegetation and special status species.
- The Board failed to explain why it couldn't conduct forecasting to identify upstream and downstream impacts considering extensive analysis.
- The Board failed to explain why it cannot estimate the emissions or other environmental impacts in its analysis.
- The Board failed to consider the cumulative impacts associated with the reactivation of the Tennessee Pass Line and the Railway.

## ***Eagle County, Colorado, Con't***

### Decision → Against the Board

- The EIS failed to demonstrate that the Board took the requisite “hard look” at all the environmental impacts of the Railway.
- The Board provided no reason why it could not quantify the environmental impacts of the oil wells it reasonably expects in the region.
- The Board failed to explain why it cannot take the next step and estimate the emissions or other environmental impacts it expected in its impacts analysis since it has identified where the oil production is expected to occur.

# ***Eagle County, Colorado, Con't***

## Decision (cont.)

- The Board failed to respond to significant opposing viewpoints concerning the adequacy of its analyses of rail accidents.
- The Board violated NEPA by “failing to take a hard look at the risk and impact of wildfires presented by the Railway” given the expected increased traffic on the Union Pacific Line.
- The EIS failed to evaluate certain adverse impacts on downline resources (biological and water resources).
- The reactivation of the Tennessee Pass Line was much too unlikely for the Board to have included among potential impacts it considered.

# ***Eagle County . . . the rest of the Story***



SCOTUS Grants Petition for Certiorari Review (filed by Seven County Infrastructure Coalition) June 24, 2024

Issue: Whether NEPA requires an agency to study environmental impacts beyond the proximate effects of the action over which the agency has regulatory authority!

- Petitioner and Federal Respondent Briefs filed
- Variety of *Amicus Curiae* Briefs filed
- Respondent's Brief (Due Oct. 18)
- Oral Argument (TBD)

Docket available at: <https://www.scotusblog.com/case-files/cases/seven-county-infrastructure-coalition-v-eagle-county-colorado/> \*links to all briefs\*



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## Cumulative Impacts Cases

# Results for 2023 cases

- Appellate Court decisions on agency cumulative effects analyses challenges – 9 total for 2023
- Agencies prevailed in 66% (6 of 9) of the opinions
  - 3 in the 9<sup>th</sup> Circuit
  - 2 in the 10<sup>th</sup> Circuit
  - 1 each in the 5<sup>th</sup>, 8<sup>th</sup>, 11<sup>th</sup>, and DC Circuits
- Agencies involved:
  - FAA (3 opinions)
  - BLM (2 opinions)
  - BOR (2 opinions)
  - 1 opinion each for STB and USACE

# *City of Los Angeles v. FAA, 63 F.4th 835 (9th Cir. 2023)*

- FAA completed a combined FEIS/ROD in May, 2021 to construct a new terminal at the Bob Hope Hollywood Burbank Airport
- Plaintiffs alleged:
  - Construction-related noise analysis inadequate due to flaws in the direct and indirect impacts analysis





# ***City of Los Angeles v. FAA, 63 F.4th 835 (9th Cir. 2023)***

- OPINION FOOTNOTE:
- *FAA argues that it “reasonably declined to conduct an extensive analysis of cumulative noise impacts, when it found that the Project would not produce any significant noise impacts.” This reflects a misunderstanding of the cumulative impact requirement. It is uncontested that multiple noise sources that individually fall short of a significance threshold may accumulate to surpass the threshold. FAA may only decline to consider cumulative noise impacts if it concludes either that the cumulative noise impact from relevant sources will not be significant or that the project's impact is so small that consideration of its contribution would not provide an “informed analysis.”*

# ***Lowman et al. v. FAA, 83 F.4<sup>th</sup> 1345 (11th Cir. Oct. 12, 2023)***

- FAA EA/FONSI for the "Phase 2" cargo facilities expansion project at Lakeland Linder International Airport
  - Expansion of the existing sort facility and office building; construction of a paved truck court, paved vehicle lot, concrete aircraft parking apron, pavement for aircraft ground support equipment, a new airport access road; extension of Taxiway A; installation of security fencing, gates, security checkpoints, aboveground fuel storage tanks and a fuel farm, and airfield lighting/signage; and modification of the airport's stormwater management system.



## ***Lowman et al. v. FAA, 83 F.4<sup>th</sup> 1345 (11th Cir. Oct. 12, 2023)***

### **COURT:**

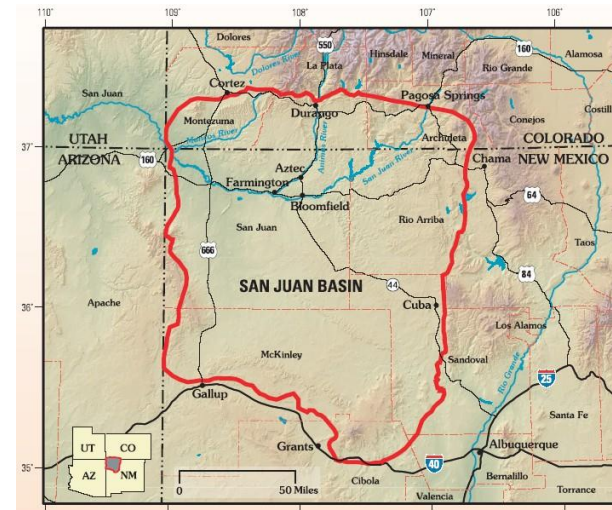
One section dealt with cumulative impacts for which the FONSI noted that “[t]he impacts associated with [Phase II], when considered in addition to other cumulative projects, are not expected to exceed the thresholds that would indicate a significant impact.” The associated cumulative effects section of the EA was more detailed, as depicted by its table that studied the impact risk of 40 different sub-projects in Phase II across 14 different target categories, including air quality, noise, and hazardous materials, and its related “cumulative impacts summary” that offered a deeper dive on the aggregated effect in each category.

## ***Lowman et al. v. FAA, 83 F.4<sup>th</sup> 1345 (11th Cir. Oct. 12, 2023)***

- COURT:
  - Turning to the cumulative impacts section of the Phase II EA, it is clear that the FAA's analysis was rigorous and detailed, and covered all of the factors that we have identified as necessary to include.
- COURT: Petitioners' contention that the FAA should have done more is merely the expression of a policy preference.
- Plaintiffs cited a passage in FAA Order 1050.1F that provides that additional air quality analyses are required in "extraordinary circumstances"
  - COURT: The problem for Petitioners is that this excerpt comes from Chapter 5, which is about Categorical Exclusions—and the Phase II project was not a categorical exclusion. Indeed, even if this section applied, if there was an "extraordinary circumstance," the proper response would be for the FAA to conduct "further analysis in an EA or an EIS." Thus, even if Petitioners were correct, they would not gain anything as the FAA already prepared an EA that did not reveal any significant air quality impacts.

# ***Diné Citizens Against Ruining Our Environment v. Haaland, 59 F.4<sup>th</sup> 1016 (10th Cir. Feb. 1, 2023)***

- 81 BLM EAs for 370 APDs for oil and gas wells in the San Juan Basin of New Mexico
- EA Addendum also challenged
- Court finds violations with GHG emissions and hazardous air pollutant analyses, but not with water resources analysis

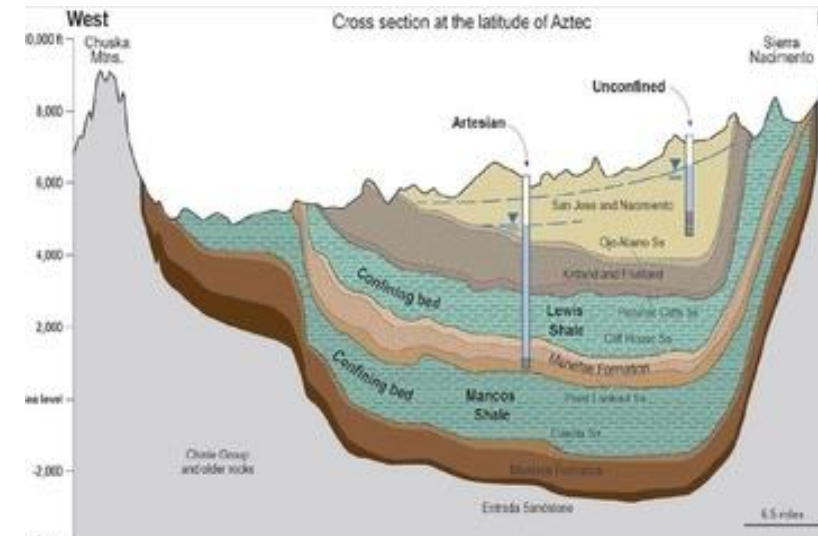


# ***Diné Citizens Against Ruining Our Environment v. Haaland, 59 F.4<sup>th</sup> 1016 (10th Cir. Feb. 1, 2023)***

- BLM argued it did estimate total GHG emissions and compared them to local, state, national, and global emissions levels, but concluded no additional analysis was necessary because "global climate models are unable to forecast local or regional effects on resources."
- Court ruled BLM impermissibly ignored comments that requested they use "the carbon budget method" to report on the significance of the project's GHG emissions
  - They did not use the method
  - They did not explain why they chose not to do so

# ***Diné Citizens Against Ruining Our Environment v. Haaland, 59 F.4<sup>th</sup> 1016 (10th Cir. Feb. 1, 2023)***

- Court ruled that the analysis of the cumulative impacts of hazardous air pollutants (HAP) from more than 3,000 wells was inadequate; BLM argued that there was no overlap cumulatively because the emissions were temporary and short-term in nature
  - Court disagrees and states long-term exposure impacts are likely from multiple overlapping well development
- Court sided with BLM that the water supply/groundwater cumulative impacts analysis was adequate



# ***Western Watersheds Project v. McCullough*** (9th Cir. July 17, 2023 - unpublished)

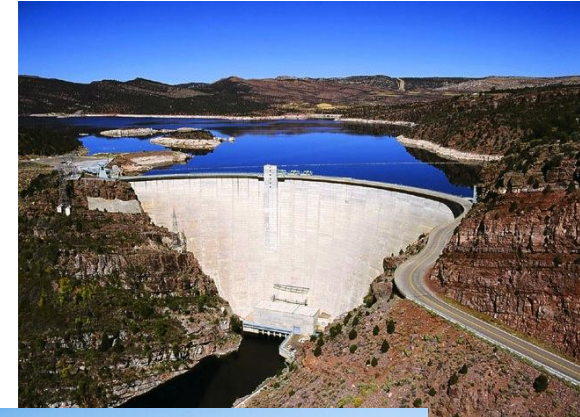
- BLM EIS for the Thacker Pass Lithium Mine Project in northern Nevada
- Court ruled BLM properly addressed cumulative impacts
  - EIS identified 20 separate study areas
  - Included past, present, and reasonably foreseeable future actions
  - Quantitative analysis of many resources, including air quality
  - The analysis had "more than vague and conclusory statements"





# ***Center for Biological Diversity v. U.S. Dept. of Interior, 72 F.4<sup>th</sup> 1166 (10th Cir. July 10, 2023)***

- BOR EA for the Green River Block Exchange Contract
- Climate change as a reasonably foreseeable future action?
  - USFWS commented that consideration of climate change on water supply was too perfunctory
  - COURT: "While Reclamation's response to FWS's comment could have been more robust..."
- Plaintiffs alleged the analysis failed to include reasonably foreseeable future depletions in the upper Green and Colorado River watersheds
  - Court rules BOR appropriately applied technical criteria to determine only 12 future depletion actions were reasonable – others were "too indefinite to merit inclusion."



# ***State of Missouri v. U.S. Bureau of Reclamation, 72 F.4<sup>th</sup> 570 (8th Cir. July 10, 2023)***

- BOR EA for the Central North Dakota Water Supply Project
- Court:
  - "In responding to a challenge to the substance of an environmental assessment's cumulative effects analysis, we have explained an environmental assessment "will be ruled deficient only if it does not include a cumulative impact analysis or is not tiered to an EIS that contains such an analysis."
- Court:
  - "Furthermore, the Environmental Assessment for the Central North Dakota Project expressly included the state-sponsored Red River Valley Project in the list of reasonably foreseeable actions. And it stated that it had taken into account that the state-sponsored project had increased in volume from 122 cfs to 165 cfs."



# Questions/Comments?

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