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Ark. Game & Fish Comm'n v. U.S., 617 F.3d 1366 (Fed. Cir. 2011)

On March 30, the United States Court of Appeals for the Federal Circuit held that the recurring flooding of a wildlife management area caused by dam releases did not constitute a taking by dam operators, reversing a Court of Federal Claims decision awarding the manager of the wildlife area damages for trees destroyed by the flooding.

The background leading to this case began in 1948, when the Army Corps of Engineers ("Corps") completed construction of Clearwater Dam on the Black River in Southeast Missouri, approximately 115 miles upstream of the Dave Donaldson Black River Wildlife Management Area ("Management Area") in Northwest Arkansas. Following Clearwater Dam's completion, the Corps conducted a five-year analysis, experimenting with various frequencies and durations of water releases from Clearwater Dam to establish a water control plan. In 1953, the plan was approved and incorporated as part of the Clearwater Lake Water Control Manual ("Manual"). Under the Manual's "normal regulation," releases were regulated so that the water height at a designated point between the dam and the Management Area did not exceed ten-and-one-half feet during the agricultural growing season and eleven-and-one-half feet during the non-growing season. The Manual allowed for deviations from the normal regulation releases for several reasons, including planned deviations requested for agricultural, recreational and other purposes. Planned deviations were only made for limited periods of time and were approved by the Corps, which considered flood potential and other effects of the deviation in making its decision.

Forty years after the adoption of the Manual, the Corps approved a planned deviation for a three-month period from September 29 to December 15, 1993, lowering the maximum release level to six feet. That same year, the Arkansas Game and Fish Commission ("Commission") objected to deviations from the 1953 plan that would lower the release rates. Lower maximum release rates meant the water would evacuate from Clearwater Dam more slowly, causing more consistent downstream flooding during the tree-growing season in the Management Area, which the Commission managed. Conversely, higher release rates would result in short-term waves of flooding that would quickly recede.

The planned deviations continued, and during the period of 1994 through 2000 the Corps periodically approved three different deviation plans with different release rates. For all but two of the years the deviation plans were in place, the release rates deviated from the 1953 plan generally from April through November, comprising the entirety of the tree-growing season during those years. During this entire period, efforts were made to propose a permanent amendment to the 1953 plan, but none was ever adopted.

In 2005, the Commission brought suit against the United States in the Court of Federal Claims, asserting the temporary release rate deviations caused repeated increased flooding and damaged and destroyed timber in the Management Area, which constituted a taking of a flowage easement and entitled the Commission to compensation. The Claims Court found that while a permanent flowage easement was not taken by the flooding attributable to the Corps' deviations, a temporary flowage easement had been taken. The Claims Court concluded that this temporary activity, combined with the damaged timber, was enough to constitute a taking of a flowage easement and awarded the Commission $5,778,757.90 in damages for dead or declining timber and regeneration costs. The United States appealed, contending that no taking had occurred, and that if it had, the damages were overstated. The Commission cross-appealed, contending that the Claims Court should have awarded additional damages for regeneration.

The United States Court of Appeals for the Federal Circuit reversed the Claims Court decision. The Federal Circuit focused its review of the case by differentiating between a taking and a tort. The court held that because the intermittent flooding was temporary in nature, and was not inevitable to recur, it was therefore an injury and not a taking. To arrive at this holding, the Federal Circuit looked to the Manual to determine if the government's flood control policy was permanent or temporary. Because the deviations were ad hoc, the court determined they could not inevitably recur, and were only temporary.

Circuit Judge Pauline Newman, in her dissent, explained that extended and repeated flooding of property does constitute a taking. In coming to her conclusion, Judge Newman cited numerous cases supporting the idea that a temporary taking, when combined with permanent damage like the destruction of timber, requires the court to find

a taking has occurred. Judge Newman explained that the majority erred in only asking whether the injurious flooding was eventually ended, and not whether the increased flooding caused significant injury before the flooding was abated.

MARK ABBOTT

Karuk Tribe of California v. U.S. Forest Service, 640 F.3d 979 (9th Cir. 2011)

In *Karuk Tribe of California v. U.S. Forest Service*, the United States Court of Appeals for the Ninth Circuit held the decision of the United States Forest Service ("Forest Service") to not require a plan of operations after receiving a Notice of Intent ("NOI") from the New 49'ers ("miners"), did not constitute "agency action" under the Endangered Species Act ("ESA"). More specifically, the court held that the Forest Service's decision to not require a plan is considered an agency's decision not to act, therefore affirming summary judgment granted in favor of the defendants, the miners.

The Klamath River ("River") runs through part of the Californian land the Karuk Tribe has considered home for many centuries. Gold deposits are located in the River, as well as the Coho, or silver salmon, for which the River is a designated critical habitat. Additionally, the River is a source of cultural and religious significance to the Tribe. To remove the gold deposits, miners will employ a machine called a suction dredger, which vacuums a small area of the riverbed and extracts the gold from other sediments. The Tribe contends that this mining significantly disturbs surface resources and destroys the aquatic habitat. Particularly, they allege that this mining activity kills salmonid and other fish eggs, kills fish food sources and disturbs the fish and their reproductive activities. However, the miners disagree and assert that there is no evidence that the mining causes harm to the Coho salmon.

The ESA standard for an "agency action" is whether the activity "may affect" a listed species, however, neither the district court nor the Ninth Circuit resolved this issue. The miners, the Forest Service and the Tribe met to discuss what criteria the Forest Service should enforce in evaluating whether a plan of operation should be required for the proposed suction dredger action.

The Organic Administration Act, 16 U.S.C. §§ 473–78, ("Organic Act") provides that federal forest lands are subject to United States mining laws. The Organic Act organized a scheme where the Forest Service could regulate mining activity on federal forest lands, but could not intervene with or prohibit activities permitted under the federal mining laws. Pursuant to the Organic Act, the Forest Service promulgated

regulations establishing that activities that "might cause disturbance of surface resources" require an NOI, and activities "likely [to] cause significant disturbance of surface resources" require a plan of operation, which cannot be conducted until the United States Forest Service District Ranger's approves the Plan.

In the present case, the Tribe argues that the Forest Service incorrectly accepted the miners' four NOI's without consulting other federal agencies. The ESA states that consultation is designed to "determine whether [a] federal action is likely to jeopardize the survival of a protected species and if so, to identify reasonable alternatives that will avoid the action's unfavorable impacts." To require consultation, there must be a "qualifying federal agency action." However, qualifying federal agency action does not encompass all action related to planned private activity; here it is the miners as private parties rather than the Forest Service that are conducting the activity. Therefore, the Tribe had to establish that the Forest Service authorized the miner's activities. The court determined the NOI's were meant to be a notification procedure, not an authorization of the proposed activities as the Tribe argues. The court notes that requiring consultation for an NOI "would undermine the goals of the entire scheme, the procedural device designed to avoid burdensome compliance obligations."

In conclusion, the court determined that it is specifically the federal mining laws that authorize federal mining activities. The Forest Service's NOI does not authorize activities, especially those of the private parties. Rather the NOI is a simple precautionary notification procedure; thus in this case, the Forest Service's decisions did not result in agency action.

SABRINA K. BENNETT

Klamath Siskiyou Wildlands Center v. Grantham, No. 10-17347, 2011 WL 1097749 (9th Cir. Cal. Mar. 25, 2011)

Plaintiffs Klamath Siskiyou Wildlands Center, Environmental Protection Information Center, the Klamath Forest Alliance and the Center for Biological Diversity (collectively "plaintiffs") bring suit against defendants Patricia A. Grantham, the United States Forest Service, Rough and Ready Lumber, LLC and South Bay Timber, LLC (collectively "defendants") for a preliminary injunction to halt the post-fire salvage logging in the Klamath National Forest. The district court denied the motion for preliminary injunction, and the United States Court of Appeals for the Ninth Circuit affirms.

The United States Forest Service ("Forest Service") determined that emergency measures were necessary to regrow the Klamath National Forest after fire swept through the area. The Forest Supervisor concluded there was a high likelihood a tree could fall onto a car or person, causing injury or damage. Therefore, in accordance with 36 C.F.R. § 215.2 and § 215.10(a), the Forest Service Chief determined that the Forest Plan, which included the logging and replanting of the forest, should be immediately implemented for "relief from hazards threatening human health and safety" as well as to avoid the loss of the forest's economic value. The plaintiffs challenge this decision, arguing that natural regeneration of the forest was preferable under the circumstances and that the Forest Service Chief abused his discretion by implementing the Forest Plan.

The district court held that the plaintiffs did not raise serious questions on the merits of the National Forest Management Act. The Forest Service had previously determined that logging and replanting trees would be beneficial for several Aquatic Conservation Strategy ("ACS") objectives. Further, the forest would recover faster than natural regeneration would allow. The Forest Service had also submitted reports concluding that natural regeneration would delay the restoration of conifers in the area and would allow predators to take over instead. Active replanting would allow the forest to recover decades faster. Further, replanting could not occur without first removing the dead logs, and so logging was essential to the recovery plan. Therefore, the Forest Service's decision to allow logging and replanting of the forest was not an abuse of discretion.

The plaintiffs also argued that the purpose of the Forest Plan is to allow only activities required to prevent the failure of ACS objectives. The court held that so long as the Forest Service does not interpret the Forest Plan arbitrarily, capriciously, or plainly inconsistent with the regulations, the Forest Plan may be read broadly. Further, the plaintiffs argued that the Forest Service should examine the Forest Plan under the Elk Creek Watershed Analysis. The court held, however, that the Forest Service may use a variety of reports to evaluate its decisions. In this instance, the Forest Service supported its evaluations with scientific research, and so it did not act arbitrarily or capriciously.

Further, the court found that the plaintiffs did not raise serious questions as to whether an Environmental Impact Statement ("EIS") was warranted under the National Environmental Policy Act ("NEPA"). The plaintiffs argued that an EIS was necessary because the forest is near the Riparian Reserves, which are an ecologically critical area, and the Forest Plan may have a significant effect on them. However, an EIS is not *per se* warranted under NEPA just because a project is in close proximity to a sensitive area. Therefore, the district court did not abuse its discretion by dismissing this claim.

MEGAN L. DITTMANN

Sierra Club v. U.S. Dept. of Agric., No. 07–01860, 2011 WL 1466930 (D.D.C. Cir. 2011)

The Department of Agriculture's Rural Utilities Service ("RUS") must prepare an Environmental Impact Statement ("EIS") under the National Environmental Policy Act ("NEPA") due to its involvement with the expansion of a coal-fired plant in Holcomb, Kansas. The power plant is owned by Sunflower Electric Power Corporation ("Sunflower"), which is a co-defendant in the suit.

The Rural Electrification Act of 1936 provides that the Department of Agriculture may issue loans with the purpose of providing electric service in rural areas. The authority was delegated to RUS, which granted the Sunflower's predecessor a loan in 1980 for the construction of a coal-fired plant. In 2002, Sunflower's predecessor was reorganized into the current Sunflower and a separate company that held some land and facilities. The new Sunflower inherited some of the debt of its predecessor, including the loans from the RUS. Under the negotiated restructuring agreement, RUS required Sunflower to seek approval before entering into certain types of contracts and before proceeding with a second coal-fired unit in Holcomb.

One of the negotiated terms at issue in the case is that the terms of the promissory notes between Sunflower and RUS were altered in the restructuring, giving Sunflower more favorable terms. The class B notes converted to non-interest bearing notes, with a shrinking principal such that if Sunflower makes all the payments on the $88.5 million in notes on time, it will end up paying only half of the face value. Other classes of notes only become due if and when a second or third coal-fired unit are built and become commercially operational.

In 2005, RUS granted approval for Sunflower to build a second unit at its Holcomb facility. In 2007, Sunflower issued more promissory notes for the additional financing of the new plant. These new notes all bore interest, but like the notes from the restructuring were only payable if and when the plants became commercially operational.

NEPA requires federal agencies to prepare an EIS upon the proposal of major actions that could significantly affect the environment. RUS did prepare an EIS before granting the original 1980 loan, but failed to do so during the debt restructuring in 2002, the plant approval in 2005,

or the financing in 2007. The court found specifically that the 2002 debt restructuring and the 2007 financing both constitute proposed, major actions, which were subjected to NEPA.

While RUS contended that the restructuring and the financing did not constitute a proposal, the court disagreed. Even though the proposal only was to keep indirect federal control over an "otherwise non-federal project," it was enough to apply under NEPA. Furthermore, RUS maintained that its 2002 and 2007 interactions with Sunflower did not constitute major actions, to which the court again disagreed. The court found that because RUS had provided assistance and exercised control both during the restructuring and in the approval for the second plant, the actions were major for NEPA purposes and thus required an EIS to be prepared by RUS.

JOSHUA K. FRIEL

Gabarick v. Laurin Maritime (America), Inc., 406 Fed.App'x 883 (5th Cir. 2010)

This case arose from an oil spill that occurred in 2008. Several parties alleged injury by the spill, which occurred after a tanker collided with a barge carrying fuel oil being towed by a tugboat. The plaintiffs filed a class action suit against the tanker owner, barge owner and limited liability company contracted to supply a crew for the tug. The District Court for the Eastern District of Louisiana entered summary judgment for the tanker owner, holding that it could not be held liable under the Oil Pollution Act of 1990 ("OPA"). The barge owner appealed the decision.

The OPA assigns strict liability to the owners and operators of vessels that discharge oil into the navigable waters of the United States. The statute assigns liability to each party that is responsible for a vessel or facility from which oil is discharged. The OPA defines a responsible party as any person owning, operating, or chartering the vessel. However, a complete defense is available to any party who can prove by a preponderance of the evidence that the oil spill and subsequent damages were caused solely by a third party. This does not include third parties whose act or omission may have caused the spill in connection with their contractual ties to the responsible party. Therefore, to relieve itself of liability, a responsible party must establish that it had no fault in the spill and that it was not in a contractual relationship with any party that had any fault in the spill. In this case, the liability is shifted to the third party, which is itself then liable to any claimant under the OPA.

American Commercial Lines, LLC ("ACL") owned the tugboat that towed the barge that discharged the oil. ACL attempted to shift its liability to the owner of the tanker, Tintomara Interests. Tintomara Interests failed to argue that ACL had any fault in the spill. Therefore, the only way Tintomara Interests could shift its liability under the OPA was by showing that ACL had some contractual relationship with another party with fault in the spill.

When Tintomara Interests filed a petition seeking to limit its liability for claims arising out of the spill, ACL filed a claim alleging that Tintomara Interests was liable to ACL for losses incurred as a responsible party under the OPA. Because the OPA assigns strict liability to the owner of the discharging vessel, Tintomara Interests moved for summary

judgment regarding ACL's claim. Tintomara Interests' summary judgment motion was based on the theory that ACL had admitted it was in a contractual relationship with D.R.D. Towing, LLC ("DRD"), which supplied personnel for the ACL's tug. Tintomara Interests alleged that this admission made ACL a responsible party under the OPA. The district court granted summary judgment to Tintomara Interests. Although discovery had not yet taken place, the lower court reasoned that some of the culpability for the oil spill was apportionable to ACL or its business partner, and ACL could not shift OPA liability to Tintomara Interests.

The Fifth Circuit found that summary judgment was premature given that discovery had not yet taken place. While DRD had some fault in causing the collision and the subsequent oil spill, and while ACL was in a contractual relationship with DRD, ACL is permitted to assert separate claims and defenses under Federal Rule of Civil Procedure 8(d)(3), even if those claims or defenses are inconsistent. ACL's admission to being in a contract with DRD was present on the face of its pleadings. However, ACL had also filed a declaratory action to have its contracts with DRD declared void. The Fifth Circuit did not address this question on its merits, but the court found that summary judgment had been, at the very least, premature until the related, pending actions were more fully developed.

JAKE KOHUT

Defenders of Wildlife v. Salazar, 776 F.Supp.2d 1178 (D. Mont. 2011)

On August 5, 2010, the United States District Court for the District of Montana ruled in *Defenders of Wildlife v. Salazar*, that the U.S. Fish and Wildlife Service's ("Service") 2009 Final Rule removing protection for northern Rocky Mountain gray wolves in Idaho, Wyoming and Montana violated the express terms of the Endangered Species Act ("ESA"). While appeal of the case was pending, the defendants and ten of the fourteen plaintiffs reached a proposed settlement agreement. The agreement, however, depended upon the court partially staying its invalidation of the 2009 Final Rule, which effectively allows removal of the gray wolf from the Endangered Species List ("ESL") in Idaho and Montana only. In this order, Judge Molloy addressed whether the District Court could grant such a stay, and discussed how a partial stay would affect settlement negotiations and further litigation.

Plaintiffs claimed that allowing the partial stay would promote recovery of the gray wolf in states other than Idaho and Montana, while resolving the pending appeal and other related wolf litigation. The State of Montana also argued its wolf population will continue to meet or exceed federal recovery criteria under the management practices utilized, and therefore the rule does not need to be upheld in Montana. Originally, the environmental impact statement set forth by the Service set a goal of 10 breeding pairs and 100 wolves in three separate recovery areas for three consecutive years. The Wyoming plan did not meet ESA standards, so protection of wolves in that state would not be lifted in order to allow the wolf population to recover in that state. The court found, however, that a stay for Idaho and Montana would fail to promote "the interests of finality or judicial economy" because the four remaining non-settling plaintiffs' interest would not be served, and therefore the settlement agreement could not be approved.

After Judge Molloy's settlement denial in *Defenders of Wildlife*, Congress intervened with the ESL for the first time in history by removing the Rocky Mountain Gray Wolf from the list in a policy rider attached to the 2011 budget bill. The rider dictated that wolves' federal protection in Montana and Idaho be lifted and managed instead by state wildlife agencies. Originally, only the Service had the power to list or delist animals from the ESL.

The rider removes the wolves from the ESL because Congress believed Idaho and Montana's state management plans were acceptable. Public wolf hunting in Montana and Idaho has now begun in order to deal with the "over-population" of gray wolves. The purpose of the hunting is to hinder the threat the wolves pose to livestock and other wildlife, specifically to elk, moose and deer.

RACHEL S. MEYSTEDT

Gardner v. United States Bureau of Land Management, 638 F.3d 1217 (9th Cir. 2011)

Little Canyon Mountain is located in Grant County, Oregon. It is comprised of approximately 2,500 acres of land and is managed by the United States Bureau of Land Management ("BLM"). Since 1985, Little Canyon Mountain has been designated as "open use" land, meaning that off-road vehicles are permitted to use the area year round. Located within Little Canyon Mountain is a two-acre parcel of land known as "the pit." The pit was once used for mining, but is now popular with off-road vehicle users.

In 2003, the BLM conducted an environmental assessment to determine the effects a proposed project would have on Little Canyon Mountain. The project, designed to decrease fire risk and improve forest health by reducing fuels, was predicted to increase off-road vehicle use in the area around the pit. This increase was projected to lead within ten years to noticeable impacts in erosion patterns and trail routes and to disturbances in wildlife. To mitigate the potential impact, the proposal suggested limiting access to the pit by vehicles more than fifty inches wide. The proposal also created a buffer around the pit to provide a sight and sound barrier between the area and surrounding land.

Local land owners, miners and grazers ("Plaintiffs") who claimed to have been adversely affected by the increase in off-road vehicle use in Little Canyon Mountain, filed a petition with the BLM in June 2006 asking that the area be immediately closed to all recreational off-road vehicle use. The BLM's field manager in charge of Little Canyon Mountain responded by letter to Plaintiffs' petition. The letter stated that Little Canyon Mountain could be closed pursuant to 43 C.F.R. § 8341.2(a) only if off-road vehicle use was causing "considerable adverse effects" upon the area. The letter also stated that the BLM was not aware of any significant increased resource damage, but that they would welcome any specific, quantifiable information that Plaintiffs could provide. The letter further requested that Plaintiffs "show [the BLM] specific instances and locations of significant problems."

Little Canyon Mountain remained open to off-road vehicle use and plaintiffs continued to complain about what they perceived to be a "dramatic increase in year-round off-road vehicle use." The BLM

initiated an alternative dispute resolution process between the complaining parties and off-road vehicle users, but it proved to be unsuccessful in resolving the dispute. Plaintiffs subsequently filed suit in 2007. The district court granted summary judgment to BLM, and Plaintiffs appealed.

On appeal, Plaintiffs claimed that 43 C.F.R. § 8341.2(a) compelled the BLM to close Little Canyon Mountain to off-road vehicle use. That statute requires the immediate closure of areas used by off-road vehicles when an "authorized officer determines that off-road vehicles are causing or will cause considerable adverse effects upon soil, vegetation, wildlife, wildlife habitat . . . or other resources." The court found, however, that the BLM had not made a finding of "considerable adverse effects" that would trigger the mandatory closure requirements of that statute. In fact, BLM's field manager specifically told Plaintiff that she was *not* aware of any significant adverse effects to Little Canyon Mountain, even when she solicited more evidence about such concerns from Plaintiffs.

Under 5 U.S.C. § 706(2)(A), an agency's decision must be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The court found that the BLM did not act in an arbitrary or capricious fashion, as "the soil, vegetation, wildlife, wildlife habitat . . . [and] other resources" located within the BLM were not affected to the level required by 43 C.F.R. § 8341.2(a) for closure. The court therefore held that the BLM did not unreasonably deny Plaintiffs' petition to close Little Canyon Mountain to off-road vehicle use and affirmed the lower court's decision.

ANNA MOLITOR

Natural Resources Defense Council, Inc., v. EPA, 638 F.3d 1183 (9th Cir. 2011)

Per the requirements of the Clean Air Act ("CAA"), the EPA is in charge of reviewing various state implementation plans for air regulation and determining whether they are adequate methods to reduce air pollution. The California Air Resources Board submitted its state implementation plan for the South Coast Air Basin (comprised of Orange County and parts of Los Angeles, Riverside and San Bernardino Counties); the plan included two "budgets" for motor vehicle emissions. The EPA only approved part of this budget, rejecting the second section. Various environmental groups ("Petitioners") challenged this ruling arguing that the EPA could not have approved any portion of the budget.

This challenge was brought pursuant to 42 U.S.C. § 7607(b)(1) which confers jurisdiction to the appellate court for review of an "adequacy" determination of an agency action. Thus, the standard of review applied by the Ninth Circuit allowed the court to set aside the challenged agency action only if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

The goal of a state implementation plan is to provide for enforcement of the national ambient air quality standards on a region-by-region basis. Because different regions have varying levels of pollution concerns, attainment of these standards has to be specifically tailored to address these issues. Each state must show how they plan on attaining the air quality set in the national ambient air quality standards. One way for a state to show this is to set a "budget" for emissions from motor vehicles for a given year. For the state implementation plan at issue here, there were two different budgets to be satisfied. One budget, known as the SIP-based budget, required that "reasonable further progress . . . be achieved for the 2009 and 2012 years, known as milestone years." The other budget, known as the "baseline" budget, only required each applicable milestone year to demonstrate "generally linear progress in reducing emissions between the base year and the attainment year." For the South Coast Air Basin, the base year was 2004, milestone years were 2009 and 2012 and the attainment year is 2015. The "baseline" budget only contained emissions budgets for the milestone years. However, the SIP-based budget contained more stringent emissions budgets for the

milestone and attainment years based on anticipation of future legislative action regarding emissions. During the public comment period, Petitioners contested both plans' budgets arguing that the emissions particles were much more numerous than the budgets assumed and thus the proposed attainment could not occur without additional measures.

The EPA found that the Air Resources Board's SIP-based budget was not adequate for motor emissions because it was based on and assumed that various emission-control measures not yet in effect were in fact going to be promulgated. However, the EPA did find that the baseline budgets were adequate and could be implemented to act as a guide for further transportation projects because they were "consistent with the requirement to demonstrate reasonable further progress."

Petitioners brought this challenge arguing that the EPA failed to consider the "attainment" year when it determined that the baseline budget was adequate; the baseline budget only gave levels for the "milestone" years. EPA admits that it did not consider the "attainment" date, but argues that nothing in any statute or regulation requires it to do so. Therefore, the issue in this case is whether or not the EPA must consider attainment data when conducting an adequacy review of an emission budget for a milestone year.

Although Petitioners put forth very logical and rational arguments, the Ninth Circuit was bound by its standard of review. Looking to the text of the federal regulations at issue, the court found that the plain-text meaning of each rule supported the EPA's propositions. Nothing in any of the regulations mandates that EPA consider attainment data when determining adequacy of a milestone year emissions budget. Petitioners made some plausible arguments showing how the language could potentially be interpreted to support their own position, however, the EPA's reading of its own regulations was very reasonable. Therefore, "an alternative reading to the agency's interpretation is not compelled by the regulation's plain language." Thus the Ninth Circuit denied the petition to challenge the EPA's adequacy determination in regards to motor emissions budgets.

KATHERINE E. VOGT

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EDITOR'S PROSPECTIVE

We begin this edition with our lead article written by Ariele Lessing, *A Supplemental Labeling Regime for Organic Products: How the Food, Drug, and Cosmetic Act Hampers a Market Solution to an Organic Transparency Problem*. In this article, Lessing brings to light the current problems with the labeling standards of organic food. She explores how the lack of a clear labeling system is misleading consumers who wish to purchase organic food based on a variety of characteristics, including sustainable farming and ethical labor practices, lack of chemical contamination, and support for community farming. Ms. Lessing delves into the National Organic Program and how its foundation did not properly account for consumer expectations. The solution to this labeling issue, according to Ms. Lessing, is through a supplemental system of organic labels each addressing a variety of consumer concerns. This system's implementation is currently hindered by the Food and Drug Administration's regulation of "misleading" food labels, so Ms. Lessing offers a solution by creating an exception specifically for organic labels. Ms. Lessing concludes that market forces, which have been hindered by the FDA's regulations, are better equipped to address the need for transparency with organic labels and ultimately provide consumers with the proper information needed to make informed decisions regarding their food.

Turning to our student notes, Mark Abbott authors our first note, *Waste Not, Want Not: Low-Level Radioactive Waste and the United States' Need for a Revised System of Disposal*. In this note, Mr. Abbott reviews the continuing problem with low-level radioactive waste disposal in light of the recent case *EnergySolutions, LLC v. Utah*. He utilizes the *EnergySolutions* case to illustrate a widespread inability for America to safely and efficiently manage its system of radioactive waste disposal. Through his analysis of Congress's legislative history on the issue, coupled with an examination of how foreign counterparts have dealt with the same problem, Mr. Abbott proposes a solution that balances the need for Congressional regulation with the ability of private companies to effectively dispose of low-level radioactive waste. Mr. Abbott also scrutinizes *EnergySolutions* in light of the recent 2011 Japanese earthquake and tsunami which lead to a nuclear crisis in Japan. He

ultimately urges Congress to take a hard look at other countries' management of radioactive waste and strive to create a safer, more secure, and predictable system of low-level radioactive waste disposal.

Joshua Friel authors our second student note, *Secular vs. Sacred: NEPA Again Proves to be an Ineffective Tool to Protect Sacred Land*, which discusses *Pit River Tribe v. United States Forest Service.* In this case, a Native American tribe sued the United States Forest Service to prevent the development of a geothermal hotspot as encouraged by the Geothermal Steam Act of 1970. The land at issue, while not owned by the tribe, was considered sacred and culturally important yet the tribe was unable to prevent development under the current system of preservation laws. Mr. Friel delves into the policies behind both the National Environmental Policy Act of 1969 and the National Historic Preservation Act and discovers that neither act adequately serve to prevent sacred land. While the two acts normally work to require courts and agencies to take a "hard look" at proposed development and ensure that the greater good is benefited, Mr. Friel deftly illustrates how both acts stop short of their true goals. The tribe utilized every procedural tool available to it and was still unable to protect its sacred land. Therefore, Mr. Friel proposes a new set of regulations, either standing alone or as an amendment to the Preservation Act, in order to provide substantial protection to sacred sites such as those presented in this case.

Our third student note comes from David Martin, *Crying Over Spilt Milk: A Closer Look at Required Disclosures and the Organic Milk Industry.* This note examines the case of *International Dairy Foods Association v. Boggs*, and focuses on a perceived bias against the organic food industry's ability to label and advertise their products. The product in question was organic milk, and the issue revolved around whether a statute preventing organic suppliers from labeling their milk as hormone-free violated the First Amendment and Dormant Commerce Clause. Mr. Martin approached this issue through First Amendment grounds as well as explaining the evolution of the FDA's regulations concerning organic food labeling. Mr. Martin argues that the organic food industry is at a disadvantage to conventional food producers who have greater power with the regulatory bodies and are using the First Amendment as a shield against further competition. With an uplifting conclusion, Mr. Martin

offers hope that despite setbacks, the organic food industry will continue to grow and the legal system will eventually accommodate this change.

Kristin Michael authors our fourth student note, *Mercury Rising? Fifth Circuit Applies Administrative Laws Retroactively Deep in the Heart of Texas*. This note discusses *Sierra Club, Inc. v. Sandy Creek Energy Association, L.P.*, a case involving a legal fight over the applicability of retroactive agency decisions. The construction of a coal-fired power plant had been authorized during the Bush Administration's temporary suspension of certain requirements of the Clean Air Act regarding all major sources of air pollutants to follow a strict procedure to ensure that each plant used the most efficient and modern pollution control technology. However, by the time construction had actually begun, this suspension had been overruled and the law required all major sources of pollutants to go through this rigorous determination process. The main question revolved around the retroactive applicability of these types of decisions. Ms. Michael makes clean work of the confusing MACT requirement standard by skillfully exploring its history and requirements, and gives a thorough explanation of the issues and cases involving retroactive administrative decisions. She comments extensively on the tension between elimination pollution and encouraging construction projects without skyrocketing costs. Ms. Michael presents both criticisms and opinions favoring the *Sandy Creek* decision and warns that this issue could quickly become a hodgepodge of split circuit decisions. She urges for uniformity and clearer precedent on the matter.

Our final case note is authored by Katherine Vogt, *Do Polluters Truly Pay? A Chip in the "Potentially Responsible Parties" Analysis for Hazardous Waste Cleanup*. Exploring the repercussion of *Celanese Corporation v. Martin K. Eby Construction Company, Inc.*, Ms. Vogt determines that although CERCLA is typically thought to apportion cleanup costs for spills among the parties responsible for creating the spill, due to recent controlling precedent, this may not always be the case. She finds a small "chip" in the typical analysis regarding a very specific fact pattern, a party may not be liable as an arranger under CERCLA if it did not take any intentional steps leading to the spill. While this normally does not produce errant results, the *Celanese* case resulted in a party who was found to be the direct cause of a multi-million dollar spill not on the hook for a single dollar. Ms. Vogt uses the history and purpose of the

CERCLA statute to argue that this result is not fulfilling the policy inherent in CERCLA. She proposes a number of solutions, including broadening state negligence law to help cover any slack during the few times this specific issue arises. Ultimately, Ms. Vogt places faith in the court system to determine a scheme that ensures the polluter truly pays.

As always, this volume ends with updates discussing recent court holdings throughout the country that impact environmental law.

It is with great excitement that we take this time to announce that starting with our next issue, Vol. 19 No. 1, the MISSOURI ENVIRONMENTAL LAW AND POLICY REVIEW is changing its name to the JOURNAL OF ENVIRONMENTAL AND SUSTAINABILITY LAW. Environmental law is an ever-evolving field and the emergence of legal and policy issues pertaining to sustainability has created an onslaught of new scholarship. Through this change in our name, we hope to demonstrate a commitment to the global nature of environmental law and the next phase of sustainable law development. We are commemorating this name change with a symposium to be held on March 9, 2012 entitled "Environmental Justice Issues in Sustainable Development." This symposium will feature Professors Michael Gerrard, Eileen Gauna, Uma Outka, John Dernbach, and Patrick McGinley.

We offer special thanks and recognition to the 2011–2012 Editorial Board for its hard work on Volume 18 of the Journal. Each edition requires diligence, dedication, and passion to be successful, and we have had an abundance of these qualities throughout the year.

Finally, a huge thank you goes to our advisor, Professor Troy Rule, for his inestimable help and limitless enthusiasm for the subject and our new direction.

KATHERINE E. VOGT
EDITOR-IN-CHIEF, 2011–2012