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NRG Power Marketing, L.L.C. v. Maine Public Utilities Commission,
130 S. Ct. 693 (2010)

The Federal Power Act (hereinafter “FPA”) authorizes the Federal Energy Regulatory Commission (hereinafter “FERC”) to regulate the “sale of electricity in interstate commerce.” Under the Act, “all wholesale electricity rates must be ‘just and reasonable.’” The *Mobile-Sierra* doctrine creates a rebuttable presumption that “a rate set by a freely negotiated wholesale-energy contract meets the statutory ‘just and reasonable’ requirement.” In order to rebut the presumption, FERC must conclude that “the contract seriously harms the public interest.”

In 2008, the Supreme Court clarified that the *Mobile-Sierra* doctrine applied equally to purchasers and sellers challenging the rate contracts under the FPA. However, the *Morgan Stanley* case did not reach the issue of whether the *Mobile-Sierra* doctrine extends to rate challenges by third parties. This term, the Supreme Court squarely addressed the issue of the relationship between the *Mobile-Sierra* doctrine and third-party challenges in *NRG Power Marketing v. Maine Public Utilities Commission*. In this case, the Court held that the *Mobile-Sierra* doctrine does apply to third-party challenges.

NRG Power Marketing arose out of New England’s continual struggle to maintain a reliable energy grid. In 2006, FERC approved a comprehensive settlement designed to inject stability into the region’s energy market. Of the 115 parties to the negotiation, 107 endorsed the settlement, which “established rate-setting mechanisms for sales of energy capacity and provided that the *Mobile-Sierra* public interest standard would govern rate challenges.” Six of the eight parties who objected to the settlement petitioned the D.C. Circuit for review. They argued that the “restrictive” *Mobile-Sierra* public interest standard should not apply to them because they were non-party challengers to the rate-setting contract. Agreeing with the settlement opponents, the D.C. Circuit concluded that “when a rate challenge is brought by a non-contracting third party, the *Mobile-Sierra* doctrine simply does not apply.”

The Supreme Court reversed, holding that the *Mobile-Sierra* doctrine applies to non-contracting parties. The Court rejected the D.C. Circuit’s view that the public interest standard of the *Mobile-Sierra* doctrine was separate from and potentially incompatible with the FPA’s

just and reasonable standard. Instead, the Court characterized the public interest standard as the application of the just and reasonable standard in the context of rate contracts. Writing for the majority, Justice Ginsberg stated that “the public interest standard defines ‘what it means for a rate to satisfy the just-and-reasonable standard in the contract context.’” Thus, there is no incongruity between the public interest standard and the just and reasonable standard because the public interest standard is merely a particular application of the broader just and reasonable standard.

The Court also determined that the universal application of the *Mobile-Sierra* doctrine to all challengers protects the interests of consumers and third parties. The FPA regulatory regime relies on voluntary contractual agreements between regulated entities. The presumption of reasonableness enshrined in the *Mobile-Sierra* doctrine protects the sanctity of the contractual relationship, which ultimately benefits consumers by stabilizing the electricity market. Because this regulatory system “contemplates abrogation of these agreements only in circumstances of unequivocal public necessity,” contracting parties can trust the contractual process and take advantage of the stability and efficiency their agreements bring to the market.

If the *Mobile-Sierra* presumption applied only to FERC and the contracting parties, its stabilizing effect would be severely limited. Any person can complain under the FPA. If those persons are not constrained by the presumption, then the *Mobile-Sierra* doctrine affords little in the way of true protection to the contracting parties. The Court also reasoned that the *Mobile-Sierra* doctrine adequately protects third parties. The doctrine requires FERC to reject any contract rate that “seriously harms the consuming public.” The “consuming public” includes third parties such as the objectors in this case.

The settlement objectors also argued that the rates incorporated into the settlement agreement were “prescriptions of general applicability rather than contractually negotiated rates.” If this were the case, the *Mobile-Sierra* doctrine would not apply. The Supreme Court expressly declined to reach this issue. “Whether the rates at issue qualify as ‘contract rates,’ and, if not, whether FERC had discretion to treat them analogously are questions raised before, but not ruled upon by, the Court of Appeals. They remain open for that court’s consideration on remand.”

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Thus, the Court reversed and remanded for additional proceedings applying the *Mobile-Sierra* doctrine to the third-party challenge.

KATIE JO WHEELER

United States v. Metropolitan St. Louis Sewer District, 578 F.3d 722 (8th Cir. 2009)

The Metropolitan St. Louis Sewer District (hereinafter “District”) manages flow and removal of waste water and stormwater for roughly 1.4 million residential and commercial users in the St. Louis, Missouri metropolitan area. This action arose in June 2007 when the State of Missouri, jointly with the United States and under federal law, filed an enforcement action which alleged that from 2000 to 2005 the District violated permits issued by the Missouri Department of Natural Resources by permitting the discharge of raw sewage from the District’s sewer system. The plaintiffs alleged that these discharges were the direct consequence of inadequate flow capacity in the District-managed sewer collection system, insufficient connections between the sanitary sewer and stormwater systems, and poor maintenance. The complainants sought immediate injunctive relief in order to limit the release of untreated wastewater and sewage in addition to federal civil damages. In its defense, the District claimed that it was financially unable to comply with the requirements of the Act, and it filed two counterclaims. Missouri moved “to strike the District’s affirmative defenses and to dismiss its counterclaims, arguing that they were barred by sovereign immunity and the Eleventh Amendment.” The Eighth Circuit Court of Appeals affirmed the district court’s denial of Missouri’s motion.

Section 309(e) of the Clean Water Act states the following:

Whenever a municipality is a party to a civil action brought by the United States . . . , the State in which such municipality is located shall be joined as a party. Such State shall be liable for payment of any judgment, or any expenses incurred as a result of complying with any judgment, entered against the municipality in such action to the extent that the laws of that state prevent the municipality from raising revenues needed to comply with such judgment.

The District argued that, as a political subdivision, the Missouri Constitution expressly limited its authority to unilaterally raise taxes so that it could generate funds that it would need in order to comply with an adverse judgment. Therefore, the District claimed, under Clean Water Act § 309(e) it was the state's duty to indemnify the District for the costs of complying with any adverse judgment. Missouri countered that the District's claims were barred by the State's sovereign immunity and that this was not waived by joining the federal action because it was required to under § 309(e) and it had not added any state claims to the complaint. The court held that Missouri had in fact waived its sovereign immunity.

In reaching its decision, the court noted that “[t]he Eleventh Amendment provides states with immunity from suit by private citizens in federal court seeking ‘retroactive relief for violations of federal law that would require payment of funds from a state treasury.’” The Eleventh Amendment itself does not by design automatically strip the federal court of original jurisdiction, but rather, the defense must be raised. On the other hand, a state may waive the immunity defense if it voluntarily invokes federal jurisdiction or files a federal complaint. In the case at bar, Missouri argued that because § 309(e) compelled it to become a party to the lawsuit (by requiring that it be joined in any action in which one of its municipalities is a party), its decision to side with the U.S. as plaintiff was not in fact a voluntary waiver of sovereign immunity but instead a legal requirement.

The Eighth Circuit held that Missouri waived its immunity by electing to align with the U.S. as plaintiff. The court noted that the “filing of a complaint in a federal district court is the quintessential means of invoking its jurisdiction.” Missouri *voluntarily* participated with the U.S. in filing the original complaint against the District; in no way did Missouri indicate that it was reluctant to join as co-plaintiff, nor did Missouri wait until it was forced to be joined under § 309(e). In fact, the complaint itself stated that Missouri filed the action “‘at the request and on behalf of the Missouri Department of Natural Resources.’”

The court emphasized that even though Missouri did not raise any state law claims, it was the State that voluntarily joined the U.S. in asserting the federal claims, and Missouri was not actually compelled to join the suit at time of the initial filing. Furthermore, while § 309(e)

compels a state to become a party, it does not require the state to do anything that would traditionally constitute a waiver of sovereign immunity, and a state may protect its immunity defense by initially aligning as a co-defendant with the municipality party and "taking no other actions inconsistent with the assertion of sovereign immunity."

DANIEL S. RICH

American Trucking Ass'ns v. EPA, 600 F.3d 624 (D.C. Cir. 2010)

American Trucking Ass'ns v. EPA involved a suit challenging the EPA's authorization of a California rule regulating in-use non-road engines. Under § 7543(e)(2) of the Clean Air Act, Congress granted California the principal power to regulate these types of engines. Under that provision, once California implements a rule and it is approved by the EPA, other states have only two choices regarding the regulation of in-use non-road engines: choose to adopt a rule identical to the approved California rule or choose not to regulate such engines altogether. California acted pursuant to this provision and adopted a rule which planned to reduce diesel particulate matter emissions and associated cancer risks by up to seventy-five percent before 2010. The rule primarily concerned the operation of transportation refrigeration units (hereinafter "TRUs"). It forced all TRU vehicles operating in California to comply with the rule.

The Clean Air Act directs the EPA to approve California's rule. Under this direction, the EPA must approve the rule as long as three criteria are met. First, California must have reasonably concluded that the rule provides at least as much protection as federal standards. Second, California must need the rule "to meet compelling and extraordinary conditions." Lastly, the rule cannot prevent "other states from deciding to 'adopt and enforce' the California rule." This includes a determination of the cost of complying with the rule. In 2005, the EPA approved the California rule under the three criteria.

The nationwide trade association, American Trucking Associations (hereinafter "Associations"), challenged the EPA's authorization and approval of the California rule under both the second and third criterion. The Associations first challenged the EPA's decision under the second criterion challenging that California did not need the rule for "compelling and extraordinary conditions." Further, the Associations claimed that the EPA acted arbitrarily when it interpreted "compelling and extraordinary" to refer to factors which create pollution.

The Associations also claimed that the third criterion was not met because the rule had a negative impact on the ability of other states to follow the regulations set by the rule. The Associations argued that many

of the trucks across the nation travel through the State of California and will be subject to the rule, and therefore, the California rule is a de facto national rule forcing most trucks to comply with the regulations which "effectively precluded" other states "from declining to follow California's lead." The Associations also claimed under the third criterion that the EPA failed to adequately consider the cost of compliance with the California rule.

The D.C. Circuit reviewed the EPA decision to determine whether the approval was arbitrary and capricious. With regards to the first claim by the Trucking Associations, the court determined that the EPA had much discretion in determining what California's needs. The court pointed to the fact that California suffers from some of the nation's worst air quality and concluded that the EPA's determination that California needed the rule was thus reasonable.

The court next reviewed the third criterion. The court first explained that the California rule only applies to trucks that have entered into California and does not force or require any other state to adopt the rule. The court found that this rule's effect was adequately considered in the EPA's decision: all the EPA needed to show was that the California rule applied only in California where California has the authority from Congress to implement the rule.

The court also stated that all the EPA had to do under the Clean Air Act was to consider the costs no matter how significant those costs were. The court concluded that the EPA did so when it determined that the cost of compliance ranged from \$2000 to \$5000 per unit.

As a result of this analysis, the court held that the EPA permissibly authorized and approved the California rule.

AARON SANDERS

Gintis v. Bouchard Transportation Co., 596 F.3d 64 (1st Cir. 2010)

On April 27, 2003, a fuel barge and tugboat owned by Bouchard Transportation Co., (hereinafter “Bouchard”) strayed off course, went west of the clearly marked shipping channel, struck a reef, and spilled approximately 98,000 barrels of fuel oil. The subsequent spill contaminated ninety miles of the shoreline. Cleanup was initially directed by a combination of the United States Coast Guard, the Massachusetts Department of Environmental Protection, and Bouchard. That effort was later transferred to a “Licensed Site Professional” (hereinafter “LSP”) acting on behalf of Bouchard and supervised by the Commonwealth of Massachusetts. The shoreline was divided into 149 segments and each segment was categorized according to the damage that had occurred. The cleanup effort was largely successful and led to nearly all affected shoreline segments being certified clean by August of 2006.

Plaintiffs, a group of waterfront property owners, brought suit in April 2006 making claims of strict liability, negligence, and common law nuisance. The district court denied the motion for class certification, finding that common issues of law and fact did not predominate throughout the many potential claims. More specifically in regards to the public nuisance claim, the district court found that, to succeed, the plaintiffs needed to demonstrate unreasonable interference and special injury supported by a showing of compensatory damages specific to each piece of property.

In arriving at its decision, the First Circuit held that, contrary to the district court’s findings, the plaintiffs had presented substantial evidence of predominating issues and, accordingly, a more searching evaluation was necessary. Moreover, the court believed that utilization of the public nuisance standard put forward by the district court—that each plaintiff must individually show injury, cause, and compensatory amount—would be contradictory to the intent of Federal Rule of Civil Procedure 23(b)(3). In fact, the court posited that such a standard would nearly eliminate the possibility of mass tort cases arising from a common cause or disaster. Instead, the First Circuit believed that since the focus on remand would likely be on the sufficiency of common evidence to prove injury,

causation, and compensatory damages, a crucial common issue of great importance already existed that was enough to satisfy federal procedural rules.

Further supporting its holding, the First Circuit noted that if each individual plaintiff was required to separately litigate her claim, Bouchard would have to repeatedly litigate the admissibility of the contamination and cleanup records regarding the spill. In response to Bouchard's assertion that those records were not even exact enough to serve as specific proof for many individual parcels and, as a result, lacked evidentiary adequacy, the court countered that such a contentious evidentiary problem lent even more credence to the eventual certification of the class. Judicial inefficiencies, the court implied, were undesirable not only to Bouchard but also to the courts and those potential plaintiffs that would find it prohibitively expensive to argue those issues individually.

After determining that the district court did not adequately evaluate the contending factual claims, the First Circuit concluded it was not in a position to certify the class. Instead, the court vacated and remanded the decision back to the district court for a ruling on certification that gave a more detailed analysis of the parties' evidence and arguments.

KAMERON M. LAWSON

Wolf Recovery Foundation v. United States Forest Service, No. 09-0686-E-BLW, 2010 WL 672753 (D. Idaho Feb. 19, 2010)

This case arose when the Wolf Recovery Foundation, and other environmental groups, (collectively, hereinafter “the foundation”) sought to enjoin the U.S. Forest Service and others (collectively, hereinafter “the government”) from using helicopters over forestland in order to dart and collar gray wolves. The government was darting and collaring the gray wolves pursuant to the Wolf Conservation and Management Plan, which was adopted by the Idaho legislature in 2002 in order to monitor the gray wolf population. The foundation argued that the forestland over which the helicopters would be operated was protected under the Wilderness Act, an Act passed in 1964 to protect land “untrammeled by man.” And because the land fell within the Act, the use of helicopters was banned.

In considering the injunction, the District Court of Idaho acknowledged that the forestland over which the helicopters would be flying was protected by the Act and that flying helicopters over land protected by the Act would generally be contrary to the Act; however, the court noted that the Act allowed banned activities to be excepted from the Act where the banned activities were “necessary to meet minimum requirements for the ‘administration of the area.’”

Although the foundation argued that the use of helicopters by the government was not necessary to meet the requirements of the administration of the area and accomplish its goal of tracking and collaring the gray wolves, the court found that the other methods, such as using leg-hold traps to capture the wolves, are less humane to the wolves and would appear to denigrate the forest experience as much as the dart and tag method that could be utilized with the helicopters. The foundation also argued that because the gray wolf, which from 1978 to 2009 was listed as endangered under the Endangered Species Act (hereinafter “the ESA”), was no longer endangered, the tagging and collaring of the gray wolf was unnecessary. The court dismissed the argument because it found the purpose of the collaring of the wolves was not just to inventory the number of wolves but also to understand the character and nature of the wilderness. Because of these reasons, the court found the use of

helicopters by the government was necessary to meet minimum requirements for the administration of the area.

The foundation also sought to enjoin the government because it did not complete either an environmental assessment (hereinafter "EA") or an environmental impact statement (hereinafter "EIS") required under the National Environmental Policy Act. The government argued that it was not required to complete these documents because it fell within two exceptions to the rule governing the completion of EAs and EISs: (1) inventories, research activities, and studies limited in context and intensity; and (2) approval, modification, or continuation of minor special uses of forestland requiring less than five contiguous acres. The court agreed with the government, finding that although the use of helicopters was clearly intense, the use of the helicopters seemed properly limited under the circumstances so as to fall under the categorical exception.

Finally, the foundation argued that, notwithstanding these facts, the government's plan amounted to "destroy[ing] the wilderness in order to save it." In addressing this issue, the court noted that the foundation was making a valid point, but justified its decision to deny the foundation's injunction because of the limited duration of the proposed helicopter tagging and collaring and the limited purpose to aid the restoration of a specific aspect of the wilderness' character. The court also stated that because it was the limited duration of the plan which saved it from being enjoined, any subsequent helicopter proposal in the current forestland would face heightened review because those activities would add to the disruption and intrusion of the current collaring project for which the injunction was denied.

TERRY L. GARNER

Medina County Environmental Action Ass'n v. Surface Transportation Board, 602 F.3d 687 (5th Cir. 2010)

Vulcan Construction Materials, LP (hereinafter "Vulcan") entered into long term leases for three adjoining properties within Medina County, Texas to develop part of this property into a limestone quarry. Vulcan's plan includes a three phase development structure, with "Phase One" including the development of 640 acres of land. Phase One is currently the only phase planned for development. Medina County Environmental Action Association (hereinafter "MCEAA") challenged as invalid a Construction and Operation Exemption Decision (hereinafter "the Decision"), which gives Vulcan the right to construct and operate service rail line from the quarry, issued by the Surface Transportation Board (hereinafter "STB"). The STB's Decision was based primarily on facts laid out in a final Environmental Impact Statement (hereinafter "EIS") which the STB had prepared earlier to assess the environmental impacts of the proposed quarry and rail line. The MCEAA contends that the STB and the United States Fish and Wildlife Service (hereinafter "FWS") did not properly comply with its obligations under § 7 of the Endangered Species Act to ensure that such rail line would not jeopardize the existence of an endangered species, more specifically the existence of the endangered golden-cheeked warbler (a species of bird) and certain karst invertebrates.

Initially, a party is to contact the FWS to determine if an endangered species might be present in the proposed area for development and if no endangered species is found to be present in the area, then no further consultation is needed with the FWS. The STB and an independent third party conducted surveys to determine if any endangered species were present in the area around the quarry and rail line. Both found no golden checked warblers and only a minute piece of land which may be possible as a suitable habitat for the bird. Additionally, no suitable habitat was found for any endangered or threatened karst invertebrates. However, the MCEAA contends that the STB's Decision was arbitrary and capricious because the STB and FWS only considered the first phase of development and did not assess the areas around the other possible phase's development.

Applying a highly differential standard for the STB's Decision, the court first looked at whether the proposed development of the entire tract was an interrelated action. The court concluded that development of the second and third phases was not determinative because the STB was only called on to approve construction of the rail line. Development of the second and third phases of the quarry plan had no effect on whether the rail line would be built and construction of the rail line had no effect on whether the second and third phases of the quarry plan would be implemented.

Second, the court concluded that the STB did not act arbitrarily and capricious when it refused to consider the cumulative and indirect effects for the development of the entire tract of land, because from the record it was not considered reasonably certain that Vulcan planned to develop any other part of the quarry. The court concluded that the STB had considered all relevant factors and did not act arbitrarily and capricious in granting its Decision because the STB determined that there was little to no threat for any endangered species by the development of the rail line. Additionally, the court noted that the STB had engaged in a best alternative analysis in preparing the ESI and Decision because, regardless of the STB's approval for the construction of the rail line, Vulcan already obtained approval for the development of the quarry and could transport the mined limestone by truck, which would be more harmful to the environment.

JOHNATHAN AUSTIN

Ohio Valley Environmental Coalition, Inc. v. Hobet Mining, L.L.C., No. 3:09-1167, 2010 WL 890972 (S.D. W.Va. Mar. 10, 2010)

Three environmental organizations, the Ohio Valley Environmental Coalition, the West Virginia Highlands Conservancy, and the Sierra Club, have members who use areas along Mud River discharges for recreation, enjoyment, and business. The organizations brought suit against Hobet for releasing selenium in amounts above its permits under the Clean Water Act and the Surface Mining Reclamation and Control Act which affected the Mud River area. The organizations claimed that the discharges caused injury to their members' aesthetic, recreational, and economic interests.

Hobet brought a motion to dismiss arguing lack of standing, insufficient Notice of Intent, failure to state a claim, failure to join an indispensable party, and that the court should not assert jurisdiction under *Younger v. Harris* and *Colorado River*. Further, Hobet moved to consolidate the claims with a Charleston Division enforcement proceeding. Because the court thought that the majority of the issues would be addressed in a motion for summary judgment by the Plaintiffs, the court only addressed the Plaintiffs' standing.

Under standing precedent, the court stated that the Plaintiffs as an organization must establish a member has individual standing, the suit is germane to the organization's purpose, and there is no need for individual members to directly participate. Further, the court asserted, an individual must establish "(1) injury in fact, (2) traceability, and (3) redressibility" to attain standing. Here, the only disputed element of standing was whether the organizations have a member with sufficient standing to proceed.

The court began with the members' injury in fact finding that the organizations had members who used the affected area for recreational purposes, the Defendant violated its water permits, and that any violation of these water permits were damaging to people who used the water affected. This was enough to establish injury in fact for the court. The court then held that there was enough evidence establishing traceability to the Defendant's permits violations.

Finally, the court addressed the redressibility of the Plaintiff's claims. It stated that the claims do not need to completely resolve the

river's selenium levels or bring the levels into an acceptable range in order to be redressible. Rather, according to the court, a showing of a reduction in selenium levels would be enough. Specifically under *Natural Resource Defense Counsel, Inc. v. Watkins*, the court found that the reduction in pollution was enough to establish redressibility. Thus, because the Plaintiffs established all of the elements required for an individual's standing and the other organizational standing requirements were not disputed, the court denied Hobel's motion to dismiss on standing.

MARTHA D. BURKHARDT

United States v. Orr Water Ditch Co., 600 F.3d 1152 (9th Cir. 2010)

The Orr Ditch Decree (hereinafter “Decree”) allocated water rights to the Truckee River. The administration of water rights adjudicated in this Decree is at issue. Plaintiff, the Pyramid Lake Paiute Tribe of Indians, contended that the Nevada State Engineer Ruling 5457 allocating groundwater adversely affects their water rights given to them under the Decree. The Tribe appealed a decision by the Nevada State Engineer (hereinafter “Engineer”) to the district court, which determined that it did not have jurisdiction over the appeal because the Decree only granted adjudication rights to surface water, not groundwater.

The Decree gave the Tribe the most senior water rights on the Truckee River. But, in 1998, the Engineer granted to the Tribe the rights to all the remaining water in the river after all other rights were satisfied. This grant was based on Nevada state law; not the Decree. The Tribe’s Reservation touches the Tracy Segment Hydrological Basin, and the Truckee River runs through the basin for about thirty miles. Between 1998 and 2003, there were several applications for new groundwater allocations. The Tribe opposed these applications because the groundwater was already fully appropriated. Prior to these applications, there had been allocations of 7976 acre-feet per year. This was well over the estimated 6000 acre-feet per year perennial yield, which was determined by the United States Geological Survey. In order to grant new allocations, the Engineer estimated the perennial yield to be at 11,500 acre-feet per year. Through this new allocation, the groundwater was no longer over-appropriated. The Engineer determined that because these were groundwater allocations, this would not affect the Tribe’s surface water rights in the Truckee River because the groundwater discharge is not part of the Tribe’s water rights. The Engineer insisted that the allocation of groundwater discharge was not even contemplated in the Decree. Thus, the Tribe’s water rights under the Decree could be diminished by groundwater allocations without a violation of the Decree.

The court disagreed with the conclusions of the Engineer. The court recognized that while there was nothing in the Decree protecting the Tribe’s specific rights from diminution of the flow of groundwater, the Decree was “intended to fulfill the purpose of the United States in

withdrawing land from the public domain for the Tribe's reservation and setting aside 'a reasonable amount of water' for use on the reservation." It would be inconsistent with this purpose to allocate groundwater at the expense of the Tribe. The court stated that the proper interpretation of the Decree was to prevent the senior water rights granted to the Tribe from being allocated to others, including both the surface water and groundwater.

The court then turned to the district court's determination that it lacked jurisdiction. A Nevada statute indicates that "*on stream systems where a decree of court has been entered, the action must be initiated in the court that entered the decree.*" Thus, the court stated, an allocation of water rights that diminishes the rights granted to the Tribe by the Decree is allowed appellate review in the court that entered the Decree. The Decree was entered by the Federal Court for the District of Nevada. Thus, the district court had subject-matter jurisdiction over the Tribe's appeal.

The court then limited the district court's jurisdiction in holding that the district court does not have jurisdiction over the Tribe's appeal to the extent that it might adversely affect the Tribe's rights under the Engineer's 1998 ruling based on state law that gave the Tribe the remaining water rights.

In the end, the court held that the Tribe's rights under the Decree may not be adversely affected by allocations of groundwater in the basin. Also, the district court had subject-matter jurisdiction over the Tribe's appeal from the Engineer's Ruling insofar as the additional allocations of groundwater adversely affect the Tribe's decreed water rights.

CARA M. LUCKEY

Conservative Congress v. United States Forest Service, No. 09-16182,
2010 WL 926078 (9th Cir. Mar. 16, 2010)

The United States Forest Service (hereinafter “Forest Service”) planned a forest thinning project which would cover 931 acres in the Shasta-Trinity National Forest, in an attempt to make the forest more resilient to wildfire. The Forest Service completed an environmental assessment of the project and determined that there would be no significant impact, and therefore, approved the project to move forward. The Plaintiffs, Conservation Congress, Citizens for a Better Forestry, and a couple of individuals, challenged the forest thinning project as violative of the National Forest Management Act (hereinafter “NFMA”) and the National Environmental Policy Act (hereinafter “NEPA”). The district court granted summary judgment in favor of the Forest Service, and the Plaintiffs appealed to the Court of Appeals for the Ninth Circuit.

The court first examined the Plaintiffs’ NFMA challenges. The Pacific fisher, which has been classified as a sensitive species, lived in the Shasta-Trinity National Forest. The Shasta-Trinity National Forest has a Land and Resource Management Plan (hereinafter “LRMP”) that sets a habitat capability model for the Pacific fisher. The Plaintiffs argued that under the LRMP, the Forest Service was required to directly monitor not only the fisher habitat but also directly monitor the fisher population. The court noted that the Ninth Circuit has repeatedly approved of the Forest Service using the amount of habitat that is suitable for a particular species as a measure of sustainability for that species and as a measure of the species population. Additionally, the LRMP only requires management to average moderate levels of habitat capability. There was no specific evidence that the changes that would result from the thinning project would change the population trend of the fisher or that the current habitat capability levels would not change after the project. Further, the Plaintiffs failed to show that the Forest Service did not rely on the best scientific data available in making its determination. Thus, the court held that the Plaintiffs failed to show that these findings were arbitrary and capricious.

Plaintiffs also argued that the Forest Service’s use of habitat components to monitor management indicator assemblages violated the NFMA’s diversity requirement and requirement to monitor the impacts of

site specific projects on management indicator species. However, in this case, there were no identified indicator species. In the absence of indicator species, the LRMP allowed the Forest Service to use habitat components to represent the assemblages, and the NFMA does not require the Forest Service to verify its prediction regarding observation or on the ground analysis. Therefore, the court found that the Forest Service complied with the NFMA analysis.

The court next turned to the challenges raised under the NEPA. The Plaintiffs challenged that the Forest Service did not adequately disclose the thinning project's impact on several sensitive, threatened or endangered species or on the water quality within the project area. This challenge was based on the contention that the Forest Service had a duty to monitor species populations, but the court stated that it did not have such a duty. Additionally, the Forest Service conducted an analysis of the thinning project and the measures that it would take to minimize any potential negative impacts the project would have on the environment. The court held that the environmental analysis that the Forest Service conducted constituted adequate disclosure of the project and its potential impacts.

The Plaintiffs also stated that the Forest Service should have filed a supplemental NEPA analysis of environmental impacts on the area from previous logging activity, but the court held that the information from the previous activity was not significant to this project, and thus not filling a supplement was not clear error.

After determining that the Forest Service did not violate the NFMA or the NEPA, the Court of Appeals for the Ninth Circuit upheld the ruling of the district court in favor of the Forest Service.

DANIELLE HOFMAN

