

RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

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I.	COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT	
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Aviall Services v. Cooper Industries,
2002 WL 31521595 (5th Cir. 2002)

In *Aviall Services*, the United States Court of Appeals for the Fifth
Circuit sitting en banc held that section 113(f)(1) of the Comprehensive

Environmental Response, Compensation and Liability Act (CERCLA) allowed a potentially responsible party (PRP) to seek contribution from other PRPs for environmental cleanup costs despite the fact that no civil action has been brought under sections 106 or 107(a) of CERCLA.

Cooper Industries (Cooper) owned several industrial facilities dedicated to aircraft engine maintenance. Cooper sold the business to Aviall Services (Aviall) in 1981. After several years, Aviall learned of contamination at the facilities. As a result of pressure from the Texas Natural Resource Conservation Commission (TNRCC), Aviall began cleaning up the property contaminated with hazardous waste. Because the company originally purchased the contaminated property from Cooper, Aviall sued Cooper in district court for compensation under CERCLA and state law. Although both Aviall and Cooper conceded that they were PRPs for purposes of CERCLA's compensation provisions, the district court granted summary judgment for Cooper since Aviall had not been subject to a CERCLA section 106 or 107(a) action for compensation. On appeal, the Fifth Circuit affirmed, holding that "a PRP seeking contribution from other PRPs under § 113(f)(1) must have a pending or adjudged § 106 administrative order or § 107(a) cost recovery action against it." *Aviall*, 2002 WL 31521595, at *1 (citing *Aviall Servs. v. Cooper Indus.*, 263 F.3d 134, 145 (5th Cir. 2001)). Aviall then sought a rehearing en banc. On rehearing, the Fifth Circuit reversed the panel majority's opinion, holding that section 113(f)(1) allows a PRP to seek contribution costs from other PRPs at any time under federal law to recover costs incurred in remediating a CERCLA site.

The court began its discussion by addressing federal cases resolved before the enactment of section 113(f)(1). When first passed, CERCLA contained no express provision for recovery through contribution, although contribution among PRPs was extremely important to accomplishing the statute's purposes. As a result, lower federal courts began to employ contribution rights that did not rely on CERCLA actions initiated through section 106 or section 107. These actions created a federal common law right of contribution to resolve such claims. However, later United States Supreme Court decisions in the 1980s cast doubt on the ability of federal courts to fashion such law. In light of this background, Congress promulgated section 113(f)(1) as part of the Superfund Amendments and Reauthorization Act (SARA).

The Fifth Circuit then analyzed the legislative history of section 113(f)(1). The court first found that the purpose of the provision was to give PRPs contribution rights and endorse the related federal court decisions. The majority then highlighted the fact that in enacting SARA,

Congress had supported federal courts in their promotion of fair solutions for dividing cleanup costs at waste sites. Finally, the court noted that despite some of SARA's legislative history indicating that contribution rights were intended to be available after a section 106 or section 107 contribution claim, other aspects of the history were contradictory and pertained to different versions of section 113(f)(1) that were not promulgated.

After its brief analysis on section 113(f)(1)'s legislative history, the Fifth Circuit focused on an analysis of the provision's express language. The first disagreement between the majority and dissent focused on the first sentence of section 113(f)(1), stating "any person may seek contribution . . . during or following any civil action under section 9606 of this title or section 9607(a) of this title." The dissent constructed the language "during or following" a section 106 or 107(a) claim to mean "only" after such claims. Emphasizing that this construction goes beyond the "plain meaning" of the language, the majority pointed out that the word "only" was not used by Congress and is used in other sections of CERCLA, thus illustrating that Congress never intended the dissent's narrow construction. Noting that Congress did use the permissive word "may," the majority then explained how the dissent misconstrued the word to mean "shall." Also, the dissent implicitly defined "civil action" to mean "a federal administrative enforcement proceeding but only when the administrative order is contested or enforced in federal court." In response, the majority asserted that such an interpretation limited the provision to actions initiated after a lawsuit by the federal government.

The en banc majority also discussed the interplay between the first and last sentences of section 113(f)(1). The majority believed that in addition to articulating a specific right of contribution in the first sentence, the provision also provided that "'nothing' shall 'diminish'" other contribution rights available to the parties. The opinion highlighted that the "savings provision" is more important given the case law before SARA since it did not restrict common law contribution actions until, during, or after actions against a party with disproportionate cleanup costs. Furthermore, the majority emphasized how the dissent's narrow reading is "at least in tension" with the Supreme Court's description of CERCLA contribution in *Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994). Reemphasizing section 113(f)(1)'s intent to codify the rulings of federal courts discussing a PRP's right to recoup cleanup costs in an action against other PRPs, the majority stated that the first and last sentences of the provision should be read together. Such a construction

would create the maximum flexibility needed for a party to cleanup hazardous waste sites and recover some of their costs.

In support of its interpretation, the Fifth Circuit addressed CERCLA case law. Noting that many cases decided after SARA have not directly addressed this issue, “given the enormous monetary exposure and the volume of litigation surround[ing] CERCLA mandates, one must assume that talented attorneys have had sufficient incentive and opportunity to explore statutory lacunae such as those created” by the dissent. As a result, the court believed that such an absence of recent precedent weighs in favor of its interpretation. Furthermore, to support its interpretation of CERCLA, the court cited to the United States Court of Appeals for the Tenth Circuit’s dicta in *Sun Co. v. Browning-Ferris*, 124 F.3d 1187 (10th Cir. 1997).

Finally, the court noted the policy considerations supporting its construction of the provision. According to the majority, the dissent’s interpretation would limit the success of CERCLA’s objectives. The court pointed out that a narrow interpretation would slow the allocation of costs between PRPs, discourage the voluntary spending of PRP funds on cleanup, and decrease the incentives for a PRP to voluntarily report contamination to state agencies.

Written by Judge Emilio Garza and joined by Judges Smith and Barksdale, the dissent asserted that the majority’s textual reading of section 113(f)(1) was flawed. Although the majority stated that the word “may” in the first sentence is permissive, Judge Garza believed that the use of the word “may” in enabling provisions usually established an exclusive cause of action. The dissent also suggested that the language “during or following” indicates that the provision is only available after a contribution claim has been initiated by the government. The dissent pointed out that when Congress meant to preserve both state and federal causes of action, it expressly stated that fact.

The dissent also suggested that the practical effect of the majority’s reading is to allow the last sentence of the provision to override the first sentence: the “savings provision” overrides the enabling cause. The dissent noted that, according to statutory construction, the enabling clause overrides the savings clause.

Likewise, the dissent asserted that the majority failed to realize that section 113(f)(1) should be read as a subsection to section 107. Pointing out that section 113(g)(3) provides a statute of limitations for section 113 contribution claims, the dissent noted the absence of a similar statute of limitations for section 113(f)(1) claims initiated after section 106 or section 107 actions. Accordingly, Judge Garza pointed out that courts

have had to fashion a statute of limitations. He stated that such drastic actions were unnecessary because section 113(g)(3)(A) provided an effective time limit after the date of judgment in any contribution action under CERCLA. As a result, Judge Garza's dissent asserted that the structure of section 113 supports the proposition that section 113(f)(1) claims should be undertaken only after section 106 or section 107 actions have been commenced.

Finally, in contrast to the majority opinion, the dissent pointed out that the existing CERCLA case law was not directly on point and did not provide clear guidance. Furthermore, because the dissent believed the statutory language to be clear, the majority's resort to policy considerations was unwarranted.

Matthew Clagett

II. ENDANGERED SPECIES ACT

National Audubon Society v. Davis, 307 F.3d 835 (9th Cir. 2002)

In the late nineteenth century, the red fox, first introduced into California as fur farm escapees, fox hunt survivors, and released pets, began multiplying in the wild. With no natural predators, the nonindigenous foxes thrived over the next century. The red fox population grew by preying on several now threatened or endangered species, including the California clapper rail, the light-footed clapper rail, the California least tern, the western snowy plover, Belding's savannah sparrow, and the salt marsh harvest mouse.

In keeping with the Endangered Species Act's (ESA) mandate to conserve endangered and threatened species, various federal agencies began using leghold traps to control red fox populations in National Wildlife Refuges. The leghold traps proved uniquely effective in assisting bird conservation activities. Outside the refuges, government and private trappers used the traps extensively to protect levees, livestock, and other protected species threatened by the red fox and other wildlife. However, some animal rights activists regarded the traps as inhumane.

In response, a coalition of seven animal advocacy groups known as Protect Pets and Wildlife introduced Proposition 4, a California state ballot initiative to prohibit certain forms of recreational and commercial trapping. The initiative would ban the use of body-gripping traps, including leghold traps, and prohibit the use of two indiscriminate killing poisons for capturing or killing wild animals within the state. Violators

would be subject to criminal prosecution, as well as fines and imprisonment. CAL. FISH & GAME CODE §§ 3003.1, 3003.2, 12005.5.

On November 3, 1998, Californians elected to enact the initiative into law by a vote of 57.44% to 42.56%. Shortly thereafter, some federal agencies voluntarily ceased trapping activities intended to protect animals listed as threatened or endangered under the ESA to avoid liability and comply with the new state law.

Following removal of the traps, a coalition of five ornithic organizations led by the National Audubon Society (bird conservationists) challenged the initiative. The bird conservationists sought to permit the use of leghold traps to protect threatened and endangered bird species from predation. Thus, within the ranks of environmentalists, a conflict arose between protecting foxes and protecting birds.

The bird conservationists filed suit in federal district court against several state and federal officials, seeking declaratory and injunctive relief. The plaintiffs challenged the portion of the initiative that banned the use of steel-jawed leghold traps by employees of the federal government, arguing that it was preempted by the ESA, the Migratory Bird Treaty Act (MBTA), and the National Wildlife Refuge System Improvement Act (NWRSIA).

The fox protectors intervened on the side of state and federal officials in defense of the initiative. Various trapper associations and private trappers (trappers) intervened on the side of the bird conservationists against the initiative. The end result was two unlikely alliances: bird conservationists and trappers as plaintiffs pitted against animal rights activists and state and federal officials as defendants.

The trappers challenged portions of the initiative that banned the use of body-gripping traps for recreation and commerce and halted the sale of fur from animals caught in California using such traps. The trappers argued the initiative violated the Commerce Clause. Further, the trappers claimed that misleading ballot material violated due process by diluting the public's right to vote. The trappers also maintained that the entire initiative was preempted by the ESA, MBTA, and the Animal Damage Control Act (ADCA).

On February 3, 1999, the district court issued a preliminary declaratory order to the effect that the initiative could not be enforced against federal trapping intended to protect ESA-listed species. Shortly thereafter, the federal agencies that had removed traps to avoid prosecution recommenced trapping activities.

On November 30, 2000, the district court issued its final order, granting a declaratory judgment in favor of the bird conservationists. The court held that the ban on leghold traps was unconstitutional, in violation of the NWRSA, and preempted by the ESA and the MBTA. Although the district court held that the bird conservationists had standing, it found that the trappers lacked standing and therefore dismissed all of their claims with prejudice. The state, the fox protectors, and the trappers appealed.

A. Jurisdiction and Justiciability

The Ninth Circuit retained jurisdiction over the case, holding that the Director of the California Department of Fish and Game was not immune from suit under the Eleventh Amendment: the Director had “direct authority over and principal responsibility for enforcing Proposition 4.” Further, because it was prospective in nature, the declaratory relief sought by the bird conservationists was permitted under the *Ex Parte Young* exception, which allows private parties to sue government officials for prospective relief from ongoing violations of federal law. *See Ex Parte Young*, 209 U.S. 123, 159-60 (1908).

The court agreed with the district court that the bird conservationists had standing because they demonstrated the three elements required. The bird conservationists suffered aesthetic, recreational, and scientific injury when the federal traps were removed. Second, the removal led to more predators, and more predators led to fewer birds, creating a plausible, direct chain of causation. Finally, their claim was redressable because if the bird conservationists win, the use of leghold traps will resume, resulting in protection of bird populations.

The court further found that the case was sufficiently ripe, because the traps had been removed before the suit was filed. Nor was the case moot, because the preliminary injunction expired when the district court’s final order was entered and the state could conceivably take steps to enforce the initiative against the federal trappers at any time.

B. Merits

The court found that the initiative expressly prohibited federal employees to use leghold traps, without exception for protection of threatened or endangered species. Because under the ESA, federal agencies must conserve listed species, and conservation includes the use of live trapping, compliance with both federal and state laws would be a physical impossibility. The court therefore concluded that the ESA

preempted the initiative to the extent that it prevented federal agencies from protecting threatened and endangered species.

The court further found that under the NWRSA, the federal government has statutory management authority over National Wildlife Refuges, where all the federal trapping to protect the threatened and endangered species in this case was taking place. Because Congress preempted state action with respect to management of the refuges, the initiative was inconsistent with federal law. The court therefore held that the NWRSA preempted the initiative to the extent that it conflicted with the federal government's statutory management authority over the refuges. After reaching this conclusion, the court found it unnecessary to address whether the MBTA also preempted the initiative.

C. The Trappers

The court reversed the district court's finding that the trappers did not have standing, holding that the trappers suffered actual economic injury when enactment of the initiative forced them to stop trapping. The injury to the trappers was redressable because if the ban were lifted, the trappers would resume trapping for profit or recreation. Further, the dispute was ripe for controversy because the trappers would continue to suffer economic injury until the ban was lifted.

After granting standing, however, the court rejected the trappers' claims. The court found that portions of the initiative banning the use of body-gripping traps for recreation and commerce and the sale of fur from animals caught in California using such traps did not violate the Commerce Clause. First, to the extent that the initiative had any discriminatory effect, "it would be in favor of interstate commercial activities undertaken by out-of-state actors." In other words, trappers could still capture animals in other states and sell them in California; with no competition from California trappers, sellers might benefit. Second, even if the initiative imposed increased or discriminatory costs as prohibited by the dormant commerce clause, the costs were overly speculative and unrealistic.

The court agreed with the district court that the ballot material for the initiative neither violated substantive due process nor diluted the public's right to vote. The allegedly misleading pro-initiative arguments included with the ballot material were balanced by opposing anti-initiative arguments, and both were separate from the text of the proposition itself. With respect to the trappers' claims that the entire initiative was preempted by the ESA and the ADCA, the court remanded

this issue to the district court because the district court had not reached these arguments in its opinion.

It remains to be seen on remand whether the ESA or the ADCA preempts Proposition 4 in its entirety. However, for the time being, red foxes and other animals in California are safe from steel-jawed leghold traps, unless they jeopardize threatened or endangered species. The Ninth Circuit resolved the dispute between environmentalists in favor of both the birds and the foxes.

Andrea Kang

*Loggerhead Turtle v. County Council of Volusia County,
Florida, 307 F.3d 1318 (11th Cir. 2002)*

In 1995, two Floridians brought suit, in conjunction with the loggerhead and green sea turtle (Turtles), against the Volusia County Council (County). The Turtles sought declaratory and injunctive relief for the takings that were occurring on the beaches of the County without an Incidental Take Permit (ITP). Seven years later, the case came before the Eleventh Circuit in regard to a single issue: does the Endangered Species Act grant attorney's fees to the nonprevailing party?

The Turtles originally plead a Section 9 of the Endangered Species Act (ESA) takings by the County on two different grounds: (1) the County's allowance of beach driving during nesting season and (2) its ineffective lighting ordinances. Both of the County's actions conceivably resulted in such a takings. In not granting a preliminary injunction against the lighting ordinance, the district court stated that while the "artificial beach lighting resulted in takes," there was insufficient evidence to establish a future taking resulting from the lighting ordinance. In addition, the court had no authority to force the County to write stricter laws. But, the court granted the preliminary injunction regarding the beach driving, holding it was reasonably likely that beach driving would result in future sea-turtle takings. A year later, the U.S. Fish and Wildlife Service (FWS) issued an ITP to the County. After the FWS permit was issued the County moved for dismissal on the grounds that both actions were now allowable. Despite the Turtles' argument to the contrary, the district court found that the ITP indeed encompassed both the lighting ordinance and the allowance for beach driving. Therefore, the district court dismissed the case.

The Turtles successfully appealed the district court's decision. *Loggerhead Turtle v. County Council*, 148 F.3d 1231, 1258 (11th Cir.

1998), *cert. denied*, 526 U.S. 1081 (1999). On remand, the Turtles amended their complaint to include the leatherback turtle as a plaintiff, added a claim under the Administrative Procedure Act with respect to the issuance of the ITP, and omitted the claim regarding beach driving. Ten days after the amended complaint was filed, the County voluntarily adopted more stringent beachfront lighting ordinances. The County's action effectively mooted the Turtles' claims before rehearing by the district court.

However, after the district court dismissed the case, it awarded attorney's fees to the Turtles. *Loggerhead Turtle v. County Council*, 120 F. Supp. 2d 1005, 1026-27 (M.D. Fla. 2000). Traditionally, courts have applied a catalyst test to determine whether fee-shifting is appropriate in cases involving statutes such as the Endangered Species Act. Congressional intent of the "whenever . . . appropriate" statutes is clear: a plaintiff whose suit furthers the goals of the statute should be entitled to recover attorney's fees regardless of whether a meritorious decision is handed down. As the Senate Report for the Clean Air Act found, "the Courts should recognize that in bringing legitimate actions under this section citizens would be performing a public service and in such instances the court should award costs of litigation to such party."

To decipher when such an award is appropriate, the Eleventh Circuit held that attorney's fees would be awarded if:

- (1) the defendant takes an action materially altering the legal relationship between the parties such that the plaintiffs achieve a significant goal of their suit;
- (2) their suit was the catalyst for such action; and
- (3) the plaintiffs claim was colorable and enjoyed a reasonable likelihood of success on the merits.

In the case at bar, the district court found that by passing the more stringent lighting ordinances, the County altered the legal relationship between the parties. Moreover, while the Turtles lost their suit for lack of a present "case or controversy," they met their goal of "[affording] greater protection to endangered sea turtles nesting on the County's beaches." The court also found that the Turtles' claims were objectively reasonable. Therefore, under the traditional catalyst test, the attorney's fees were appropriate in this particular case. The County appealed the court's decision on attorney's fees.

The County argued that the recent Supreme Court decision in *Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), eliminated the catalyst test for shifting fees in cases such as the present one. The County argued that *Buckhannon* only allows a party that obtains a judgment on the merits to

be eligible for attorney's fees. Therefore since the district court had granted summary judgment in favor of the County, the Turtles should not be entitled to attorney's fees. The Eleventh Circuit disagreed.

Reviewing the question of law of which standard to apply *de novo*, the Eleventh Circuit evaluated whether *Buckhannon* eliminated the traditional catalyst test for "whenever . . . appropriate" statutes. Based on three factors, the Eleventh Circuit held that *Buckhannon* was only applicable to "prevailing party" statutes. To begin with, *Buckhannon* lacked any reference to the leading Supreme Court decision discussing the catalyst effect, *Rucklehaus v. Sierra Club*, 463 U.S. 680 (1983). In fact, no reference was made to any "whenever . . . appropriate statutes" in the case. Second, the Eleventh Circuit surveyed how other circuits were ruling on this particular issue. Of the two courts which had reviewed the issue, both determined that the *Buckhannon* decision did not apply to "whenever . . . appropriate" statutes. Furthermore, the court found that the policy issues surrounding damage awards in *Buckhannon* were not at issue in the present case. In *Buckhannon*, the Court reasoned that, under statutes that allow for damages, "so long as the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case." Unlike causes of action that warrant damages, a plaintiff bringing suit under the Endangered Species Act can *only* seek equitable relief. In such an instance, the theory behind the policy in *Buckhannon* actually "cuts the other way." Therefore, the present case did not present a policy issue which could possibly warrant disregarding the catalyst test. Holding that *Buckhannon* was distinguishable from the present case, the Eleventh Circuit completely discounted the County's argument that *Buckhannon* should be the prevailing case law on the present issue and evaluated what other test should be applied.

Reiterating the clear Congressional intent of the "whenever . . . appropriate" statutes, as well as Congress' ability to consciously assign one type of fee-shifting clause over another, and the irrelevance of the *Buckhannon* decision to "whenever . . . appropriate" statutes, the Eleventh Circuit held that the catalyst test is the appropriate test to apply when reviewing whether attorney's fees are appropriate for causes of action brought under the Endangered Species Act.

The Eleventh Circuit then reviewed whether the award was clearly erroneous or constituted an abuse of discretion. After four years of litigation, the County amended its lighting ordinance "closely on the heels of [the Eleventh Circuit's] decision favorable to the Turtles on the same issue." This coincidence was too much to ignore. The Eleventh Circuit held that the district court's decision that the Turtles' claim fell

within the gambits of the fee-shifting test was not clearly erroneous or an abuse of discretion. In so holding, it upheld the award of attorney's fees for the Turtles and for parties which bring suit under the Endangered Species Act in the future.

Jennifer A. Mogy

III. NATIONAL ENVIRONMENTAL POLICY ACT

Hodges v. Abraham,
300 F.3d 432 (4th Cir. 2002)

Here, the appellant, governor Jim Hodges (Hodges) of South Carolina, pressed forward his efforts to prevent long-term plutonium storage in his state by alleging that the Department of Energy (DOE) failed to adequately consider the environmental consequences of transferring plutonium from Colorado to South Carolina, as mandated by the National Environmental Policy Act (NEPA). After the district court summarily refused to enjoin the transfer, Hodges appealed, again alleging that the DOE failed to comply with the NEPA requirements. His argument was deemed unpersuasive: the United States Court of Appeals for the Fourth Circuit held that the DOE's analysis of the situation, spanning seven years, included sufficient consideration of the adverse effects of long-term plutonium storage, and thus, was in compliance with the NEPA.

From the late 1940s to the late 1980s, the United States and the Soviet Union engaged in a nuclear arms race, where they produced nuclear weapons powered by tons of plutonium. But in 1991, after the Soviet Union fell, the United States and Russia agreed to reduce their nuclear weapons stockpiles. Formally, each agreed to dispose of thirty-four metric tons of surplus plutonium. The responsibility for disposal of nuclear materials in the United States rests with the DOE. 42 U.S.C. §§ 7112(10), 7133(a)(8) (2002). At the same time, the DOE is subject to the NEPA, which guarantees, *inter alia*, that federal agencies take a "hard look" at environmental consequences before taking action that may affect the environment.

For every "report on . . . major Federal actions significantly affecting the quality of the human environment," an environmental impact statement (EIS) must be prepared. 42 U.S.C. § 4332(C). If an EIS is not clearly necessary, an environmental assessment (EA), which "concise[ly]" analyzes whether an EIS is needed, must be completed. 40 C.F.R. § 1508.9 (2002). Subsequent to preparing an EIS, if the agency's

plans change, or the circumstances surrounding a project change, a supplemental environmental impact statement (SEIS) must be prepared. 40 C.F.R. § 1502.9(c)(1). Under DOE regulations, if it is unclear whether a SEIS is required, the agency must prepare a supplemental analysis (SA). 10 C.F.R. § 1021.314(c) (2002).

Before the Tenth Circuit could entertain Hodges' allegations, it had to decide whether or not he had standing to sue, which the DOE contested for the first time on appeal. This finding turned on whether or not Hodges suffered an "injury in fact," the only prong of standing not clearly satisfied. Hodges responded that he had suffered injury to his procedural rights, which sufficiently constitutes standing only if "the procedures in question are designed to protect some threatened concrete interest." As the "threatened concrete interest" protected by the NEPA, Hodges asserted his proprietary interests in South Carolina's land, streams, and drinking water. The court followed Justice Scalia's observation in *Lujan v. Defender's of Wildlife*, 504 U.S. 555 (1992), where he noted that an individual living close enough to a federally proposed dam site would possess standing to challenge under the NEPA. Accordingly, because at least one state highway ran through the proposed South Carolina plutonium storage site, the court viewed Hodges as a neighboring landowner whose property is at environmental risk by the DOE's action. Thus, Hodges possessed standing to sue because NEPA aimed to protect his interest.

Consequently, Hodges' asserted NEPA violations were addressed. First, he contended that the DOE's latest SA (2002 SA) failed to fully evaluate the risks of long-term plutonium storage at the South Carolina site. To the contrary, the 2002 SA specifically evaluated whether the long-term plutonium storage would create environmental consequences not already considered by the DOE in its prior NEPA documents, which were incorporated into the 2002 SA. *See* 40 C.F.R. § 1502.21 (permitting incorporation to "cut down on bulk without impeding agency and public reviews of action"). Likewise, the court looked to see the evaluations made by the prior documents. In its 1996 Programmatic Environmental Impact Statement (PEIS), the DOE explored options for long-term plutonium storage, as well as the effects of storing the plutonium at the South Carolina site for up to fifty years. Then, in its 1998 SA, the DOE examined whether temporary storage for up to ten years would create any consequences not already considered. Finally, in the 2002 SA, the DOE looked at whether storage for more than ten years would create additional impact or risk of a nuclear accident. In response, the DOE answered in the negative: "The potential impacts from the

storage of surplus plutonium [in the South Carolina site] are not significantly different [from] . . . the impacts identified in the [1996 PEIS].” On the basis of these findings, the court held that the DOE sufficiently conducted the “hard look” mandated by the NEPA in assessing the risks of long-term plutonium storage at the South Carolina site.

Hodges’ final substantive contention was that the 2002 SA only contemplated storage for twenty years, not fifty years. The court quickly dispensed this argument because Hodges misconstrued a DOE statement in the 2002 SA that the “DOE . . . believes storage in [South Carolina] would be necessary for less than 20 years.” It was obvious to the court that this statement, standing alone, could not be taken to mean that the DOE only assessed storage risks for up to twenty years because this only evinced the DOE’s hopes to store the plutonium for only that long. The court pointed out that the 2002 SA specifically examined the environmental impact of plutonium storage for up to fifty years. Furthermore, the 1996 PEIS, which first studied the storage risks for up to fifty years, was incorporated in the DOE’s most recent assessment, the 2002 SA. Therefore, after failing to provide any meritorious challenge to the NEPA, the district court’s summary judgment was affirmed.

Jeffrey Strauss

IV. NATIONAL ENVIRONMENTAL POLICY ACT AND ENDANGERED SPECIES ACT

Sierra Club v. United States Department of Energy,
287 F.3d 1256 (10th Cir. 2002)

In the instant case, the Sierra Club, an environmental organization, brought suit in the District of Colorado challenging the United States Department of Energy’s (DOE) issuance of a road easement to a mining company that sought to expand its mining operations. The Sierra Club argued that DOE failed to satisfy the procedural requirements of both the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA) in granting the easement. With respect to the NEPA claim, the Sierra Club contended that the NEPA required the DOE to prepare an environmental impact statement (EIS) before granting the easement to the mining company. Regarding the ESA claim, the Sierra Club asserted that the DOE failed to consult with the Fish and Wildlife Service (FWS) before granting the easement, as required by the ESA. The District Court

dismissed the lawsuit on the grounds that the claims were not ripe for review and the Sierra Club appealed.

Under the NEPA, an agency is required to prepare an EIS before undertaking “legislation and other major Federal actions significantly affecting the quality of the human environment.” The DOE determined that neither an environmental assessment nor an EIS was required in the instant case because the granting of the easement was exempt from environmental review pursuant to 10 C.F.R. Pt. 1021, subpart D, App. A, as a transfer of property without a change in its use. The Sierra Club asserted that this exemption was unlawful, and thus the NEPA required the DOE to prepare a full EIS before granting the easement.

The ESA requires federal agencies to “confer with the FWS on any agency action that is likely to jeopardize the continued existence of or result in the destruction or adverse modification of critical habitat for any species proposed to be listed as endangered or threatened.” The Sierra Club argued that the easement was likely to jeopardize the continued existence of the Preble’s Meadow Jumping Mouse. Thus, the DOE was required to consult with the FWS before granting the easement.

In the present case, the DOE argued that the Sierra Club’s procedural claims regarding the easement were not yet ripe because the DOE would have to approve the construction before work on the road could begin. Thus, as the DOE had not given its approval, the road might never be built. Therefore, judicial intervention would not be appropriate until more specific plans were announced. The Sierra Club disagreed, insisting that its claims regarding the alleged failure of the DOE to comply with the NEPA and the ESA before granting the easement were ripe even though the road had not been built. According to the Sierra Club, because the granting of the easement was a separate action apart from the construction of the road, its challenges regarding the granting of the easement were ripe.

In its decision, the United States Court of Appeals for the Tenth Circuit first noted that the ripeness requirement is intended to prevent the courts from “entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.” Thus, the court should consider (1) whether delayed review would cause hardship to the plaintiffs, (2) whether judicial intervention would inappropriately interfere with further administrative action, and (3) whether the courts would benefit from further factual development of the issues presented.

The Tenth Circuit agreed with the Sierra Club, noting that the Sierra Club's claims regarding the alleged failure of the DOE to comply with the NEPA and the ESA challenged the granting of the easement, not the construction of the road. The court found that the granting of the easement was a separate federal action apart from the road construction; thus, the DOE's argument that the road might never be built was irrelevant. Further, the court distinguished the Sierra Club's procedural claim from a substantive claim challenging the result of a NEPA analysis. The Tenth Circuit based this holding on the Supreme Court's decision in *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998), stating that when a plaintiff challenges the failure of an agency to comply with a procedural requirement, the challenge becomes ripe at the time the failure occurs (assuming the plaintiff has standing to bring the claim). Since the DOE's action granting the easement had already occurred, the Sierra Club's procedural challenges regarding that action were ripe for adjudication.

The Tenth Circuit also decided the issue of the Sierra Club's standing to sue, first addressing the injury-in-fact requirement. Under the NEPA and the ESA, the court stated that the plaintiff must establish an injury in fact by showing "(1) that in making its decision without following the NEPA's procedures, the agency created an increased risk of actual, threatened or imminent environmental harm; and (2) that this increased risk of environmental harm injures its concrete interest." Further, the court noted that with respect to a NEPA claim, the harm need not be immediate, as "the federal project complained of may not affect the concrete interest for several years." The court found that the Sierra Club's evidence showed that the easement granted by the DOE had the potential to harm the environment, thereby establishing an increased risk of environmental harm. Further, the court found that the Sierra Club had demonstrated an injury to its concrete interests by showing that its members (1) worked to protect the "threatened" Preble's Jumping Field Mouse and (2) used the affected area for recreational and educational purposes. Therefore, the Sierra Club had established an injury-in-fact from the DOE's failure to perform its procedural duties under the NEPA and the ESA.

Finally, the court addressed the last two constitutional standing requirements. The court found that the Sierra Club's alleged injury was fairly traceable to the DOE's conduct. As the injury complained of occurred due to the "agency's uninformed decisionmaking," the court found that the Sierra Club's injury was directly related to the DOE's failure to conduct the analyses required by the NEPA and the ESA.

Further, the court found the injury to be redressable by a court order “requiring the DOE to undertake a NEPA and an ESA analysis in order to better inform itself of the consequences of its decision to grant the easement.”

The court concluded that the Sierra Club’s procedural claims against the DOE were ripe for adjudication. Further, because the Sierra Club had demonstrated standing to bring the suit, its procedural challenges against the DOE should proceed. Thus, the Tenth Circuit remanded the case to the district court to determine if the DOE was required to prepare an EIS and consult with the FWS before granting the easement.

Christopher Williams

V. ALIEN TORT CLAIMS ACT

Doe v. Unocal Corp.,
2002 WL 31063976 (9th Cir. 2002)

In a breakthrough case for foreigners seeking to hold multinational corporations accountable for human rights abuses, the United States Court of Appeals for the Ninth Circuit reversed a federal district court decision and recognized that corporations can be held liable for aiding and abetting egregious human rights violations, including forced labor, rape, and murder.

In 1992, defendant Unocal Corporation acquired a 28% interest in a gas pipeline project (Project) in Myanmar, formerly known as Burma. The Myanmar Military (Military) provided security for the project by supplying battalions, building helipads, and clearing roads along the proposed pipeline route. However, there was sufficient evidence to raise genuine issues of material fact concerning whether the Project *hired* the Military and the extent to which the Project directed the Military in these protective actions. At least one e-mail between Unocal employees in 1996 suggested Unocal had some control over the Military and could influence the Military not to commit human rights violations.

The plaintiffs are villagers from Myanmar’s Tenasserim region, a rural area through which the Project runs. Plaintiffs alleged that the Military, under threat of violence, forced them to serve as laborers for the Project. The villagers testified that the Military, in the course of providing security for the Project, subjected them to acts of murder, rape, and torture. One plaintiff testified that after her husband was shot for attempting to escape the forced labor program, she and her baby were

thrown into a fire resulting in injuries to the woman and the death of her baby.

Prior to investing in the Project, Unocal hired a consulting company to assess the potential risks involved in the investment. The consulting company informed Unocal that the Myanmar government routinely makes use of forced labor to construct roads and that the Military was actually implementing such practices in connection with the Project.

In 2000, two groups of villagers from the Tenasserim region brought actions against Unocal and the Project under state law and the Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350 (2002), for human rights violations surrounding the Project. In a consolidated action, the federal district court established that Unocal “knew or should have known that the Burmese military did commit, was committing and would continue to commit” human rights violations for the benefit of the Project. *See Doe/Roe II v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1306 (C.D. Cal. 2000). Nonetheless, the district court granted Unocal’s summary judgment motion and held that plaintiffs could not show that Unocal “actively participated” in the violations. The Ninth Circuit reversed the district court’s ruling.

Calling the forced labor employed by the Military the “modern variant of slavery,” the court held that plaintiffs had presented evidence that Unocal assisted the Military in the perpetration of the human rights abuses. The assistance came in the form of hiring the Military to provide security and build infrastructure along the pipeline. Unocal became liable as an aider and abettor because it knew or should have known that acts of violence would probably be committed by the Military in furtherance of the Project. The court reasoned that the forced labor that occurred as a result of the Military’s presence probably would not have occurred without Unocal’s involvement.

While Unocal was held liable as an aider and abettor, the court went on to hold that defendants, Myanmar Military and Myanmar Oil, had immunity under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1605 (2002). The FSIA provides for several exceptions to foreign immunity including: (1) for acts performed in the United States in connection with commercial activity of the foreign state elsewhere; or 2) for acts outside the United States in connection with a commercial activity of the foreign state elsewhere that cause a *direct effect* in the United States. 28 U.S.C. § 1605(a)(2). Plaintiffs unsuccessfully argued that these two exceptions applied to defendants Myanmar Military and Myanmar Oil and that immunity should not be extended. Holding that neither exception applied, the court reasoned that the acts performed by

these two defendants neither occurred in the United States nor had direct effects in the United States. The “locus” of the injuries was Myanmar. The U.S. profits gained from the Project were not sufficiently tied to the acts to satisfy the meaning of “direct effects.”

The court went on to deny Unocal’s claim that plaintiffs were barred from bringing this action by the “act of state” doctrine. The doctrine is based on the idea that “the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.” *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). The doctrine arose in the present case because, in order to hold Unocal liable, the court had to decide whether the conduct of the Military that occurred *in* Myanmar, violated international law. Finding that the doctrine did not preclude suit, the court reasoned that a four-factor balancing test weighed against the application of the act of state doctrine. Among other considerations, the court reasoned that judicial consideration of the matter would not substantially exacerbate hostile confrontations with the Military nor were defendants Myanmar Military and Myanmar Oil’s alleged violations in the public interest.

The broader implications of the Ninth Circuit’s decision are significant. The decision establishes a new benchmark for multinational corporations investing in projects abroad. No longer will companies be able to turn a blind eye to labor relations in developing nations. In a country like Myanmar, where the Burmese military has one of the world’s worst records concerning human rights, foreign investors raising the labor standards could put pressure on local entities to do the same.

Such actions could translate into changes in labor standards as well as environmental justice. If U.S. corporations are forced to adhere to U.S. standards and are held liable under U.S. law, the heightened standard could translate into a victory for the environment. Myanmar’s rich pool of diverse natural resources is currently being exploited for the benefit of the military. Foreign corporations engaging in joint ventures with the Military are logging, fishing, mining, and drilling the country into environmental devastation. While the Ninth Circuit’s ruling will not likely force an end to the destructive union between multinational corporations and the Burmese military, it will force U.S. corporations to keep a watchful eye on their foreign investments.

Courtney Harrington

VI. PRICE-ANDERSON ACT

In re Hanford Nuclear Reservation Litigation,
292 F.3d 1124 (9th Cir. 2002)

This appeal involved claims for damages brought under the Price-Anderson Act, 42 U.S.C. § 2014(hh) (2002), by several thousand plaintiffs allegedly harmed from years of exposure to high levels of radiation from the Hanford Nuclear Weapons Reservation (Hanford). The United States Court of Appeals for the Ninth Circuit reversed a district court decision that granted partial summary judgment in favor of several companies that operated the facility for the U.S. government. The Ninth Circuit found that the lower court erred in bifurcating generic and individual causation issues during discovery and in applying a “doubling-dose” standard that requires proof of exposure to radiation levels that double the risk of disease as compared to the general population’s risk from radiation exposure.

Hanford, constructed during World War II, was the first large-scale plutonium manufacturing facility in the world. During varying periods between 1943 and 1987, each of the five defendants in this case operated Hanford under contract with the United States. In 1987, the United States Department of Energy created the Hanford Environmental Dose Reconstruction Project (HEDR) to estimate and document all radionuclide emissions from Hanford to ascertain whether neighboring individuals and animals had been exposed to harmful doses of radiation. In 1990, HEDR released a report disclosing that large quantities of radioactive, and nonradioactive, substances had been released from the facility, thereby sparking a blaze of litigation. As a result, thousands of plaintiffs filed complaints in the District Court for the Eastern District of Washington, alleging various illnesses caused by exposure to Hanford’s toxic emissions. In 1991, the district court consolidated all of the Hanford related actions. The joint consolidated complaint was filed as a class action but has not yet been certified, thus the plaintiffs proceeded individually.

In handling the cases, the district court set forth a discovery schedule divided into three phases. Phase II was then divided into two parts. The first part focused on issues related to generic causation, i.e., whether exposure could cause the alleged injuries. The second part addressed issues related to individual causation, i.e., whether exposure in each plaintiff’s case caused his or her injuries.

The district court’s ruling came during the first half of Phase II discovery, where the parties bitterly disputed the appropriate burden of

proof that the plaintiffs should meet to survive dispositive motions on issues of generic causation. The plaintiffs maintained that at the generic causation stage they needed to prove only that emissions released from Hanford had the capacity to cause the claimed illnesses. The district court, however, agreed with the defendants relying on *Daubert v. Merrell Dow Pharmaceuticals, Inc. (Daubert II)*, 43 F.3d 1311 (9th Cir. 1995), to determine that in order to survive summary judgment on issues of generic causation, each individual plaintiff had to prove not only that the radiation was capable of causing injury, but also that he or she had been exposed to a dose of radiation that statistically doubled their risk of harm over the risk that exists for the general population. The district court determined that many of the plaintiffs failed to meet their burden of proof because they had not demonstrated individual exposure to a level of radiation that doubled their risk of harm. The court granted the defendants partial summary judgment, dismissing in part the plaintiffs' claims. Plaintiffs appealed the district court's decision.

On appeal, the Ninth Circuit first dealt with the district court's alleged violation of the discovery plan which bifurcated discovery on issues regarding generic causation from discovery on issues of individual causation. The plaintiffs argued that by adopting the defendants' "doubling dose" standard, the district court deviated from its own discovery orders and prematurely decided issues of individual causation. The plaintiffs contended that this was prejudicial to their case because their mistaken expectations relating to the discovery procedure shaped the production of expert reports and responses to dispositive motions. Agreeing with the plaintiffs, the Ninth Circuit ruled that the district court blurred its own two-step causation inquiry by skipping the generic causation inquiry and deciding issues of individual causation without the benefit of full discovery or particularized medical evidence. The Ninth Circuit concluded that the "doubling-dose" standard played no part in the initial generic causation inquiry and held that the only relevant question during the generic causation phase of discovery was whether the exposure of radiation from Hanford was capable of causing a particular injury or condition in the general public.

The Ninth Circuit next addressed the plaintiffs' contention that the threshold level the district court required the plaintiffs to meet, a level that doubled the risk of suffering injuries, was not relevant to a case in which there was scientific evidence that a substance was capable of causing the alleged injuries. Agreeing with the plaintiffs, the Ninth Circuit clarified and narrowed the application of the "doubling-dose" standard first applied in *Daubert II*. Distinguishing the present case from

Daubert II, the court noted that plaintiffs in *Daubert II* had no scientific evidence that the morning sickness drug, Bendectin, was capable of causing birth defects, and therefore were required to produce epidemiological studies to prove Bendectin more likely than not caused their own individualized injuries. The court said that in cases that rely primarily on epidemiological evidence, the “doubling-dose” standard is appropriate. In the present case, however, the court noted that there is recognized scientific and legal authority that radiation is capable of causing a broad range of illnesses, even at the lowest doses. The court held that using the “doubling-dose” standard is inappropriate because it forces plaintiffs to prove that they were exposed to a specific level of radiation, without regard to individualized factors, such as heredity, that might raise the likelihood of illness at lower levels of exposure. The Ninth Circuit ruled that the district court erred in requiring epidemiological evidence that would require a plaintiff to prove exposure to a specific level of radiation that created a risk greater than double that of people in the general population. Ultimately, the Ninth Circuit reversed and remanded the case to the district court for resolution of generic causation issues before determining individual causation issues.

Christopher Hussain

VII. OREGON CONSTITUTIONAL AMENDMENT MEASURE 7

League of Oregon Cities v. State of Oregon,
2002 WL 31235582 (Or. 2002)

In this consolidated action, the Supreme Court of Oregon declared Measure 7, an amendment to the Oregon Constitution, void in its entirety. In the 2000 general election, 53% of the Oregon voters passed voter initiative Measure 7 to amend article I, section 18, the “takings” clause of the Oregon Constitution. The amendment would require that when a state or local government enacts or enforces a regulation restricting an owner’s use of his property, thereby reducing the property’s value, the government must pay the owner compensation “equal to the reduction in the fair market value of the property.” The amendment would not require compensation, however, if the property regulation prohibited the selling of pornography, performing nude dancing, selling alcoholic beverages, or operating a casino.

Because the amendment makes a distinction between government rules regulating the selling of pornography from other kinds of government regulations, the Oregon Supreme Court found that the

amendment implicitly and substantially affects not only the “takings” clause, but also article I, section 8, the “freedom of expression” clause of the Oregon Constitution. In addition, because Measure 7 substantively changes two articles of the constitution that are not closely related, the court held that it violates the “separate vote” requirement of article XVII, section 1, which provides that when two or more amendments are made to the constitution, the voters shall vote on each amendment separately.

Lest there be any doubt about Measure 7’s target, the amendment articulates which type of regulation would give rise to a takings claim: any regulation imposing an “affirmative obligation to protect, provide, or preserve wildlife habitat, natural areas, wetlands, ecosystems, scenery, open space, historical, archaeological or cultural resources, or low income housing.”

Among the plaintiffs were both local governments and landowners. The local governments opposed Measure 7 because of the enormous fiscal impact on any city or county that chooses to regulate property, officially estimated to be \$3.8 billion per year. The landowners opposed Measure 7 based on concerns that the government would repeal or not enforce land use regulations on land parcels surrounding their properties, with the result that their land would lose value.

As an example, one plaintiff, the mayor of Jacksonville, Oregon, alleged that as a property owner, he would be adversely affected by Measure 7. In his case, local opposition to a conditional forest use permit prevented the development of an aggregate mine near his hometown. But Jackson County is now reconsidering its opposition to the mine because of a potential \$50 million takings claim under Measure 7. If the mine is developed, however, Jacksonville property values will likely decline, including the mayor’s property.

The court easily found that the amendment explicitly and substantially affected article I, section 18 of the Oregon Constitution. Under its current version, section 18 provides that property may not be taken for public use without just compensation. Payment is due only when a property owner demonstrates that a governmental regulation has deprived the owner of all economically viable use of the property. If some beneficial use of the property remains, the owner does not have a regulatory takings claim. In contrast, under the Measure 7 amendment, any reduction in the value of the property resulting from the enforcement or enactment of a restrictive use regulation would give rise to a takings claim.

The court also found that Measure 7 implicitly, but substantially, amended the freedom of expression clause of the constitution. The

question the court focused on was whether owners whose property is used for selling pornography would experience any change in their constitutional right to free expression if Measure 7 were enacted.

Article I, section 8 currently prohibits the state or any local government from enacting a law that is directed against the content of constitutionally protected expression. According to the court, the term pornography, as used in Measure 7, includes protected expression, “no matter how offensive to some people.” Neither the state nor local government may enact a law targeting sellers of pornography, because such a law would be directed against the content of the expressive material. Nor may the government treat those who sell expressive material more restrictively than other merchants. A government benefit offered to some property owners but denied to others because they engage in a particular type of expressive activity offends article I, section 8.

Under the Measure 7 amendment, the government could decline to pay just compensation to property owners selling pornography because they sell pornography, thereby restricting their rights of expression under article I, section 8. Regardless of whether the state or a local government ever chose to take advantage of the pornography exception, the inclusion of the exception nonetheless changes the rights guaranteed by section 8.

Measure 7, then, would have the effect of substantially amending two provisions of the Oregon Constitution. First, it would expand the rights of property owners under section 18 to obtain compensation for government regulation. Second, the measure would limit the rights of certain property owners based upon the content of expressive material sold on their property, thereby restricting their rights under section 8. Because the two provisions involve separate constitutional rights granted to different groups of people, the court found that the changes brought about by Measure 7 are not closely related.

To amend the Oregon Constitution by voter initiative, article XVII requires that voters vote separately on each amendment. The court found that Measure 7 violated this “separate-vote” requirement by substantially changing two unrelated provisions of the constitution. Proposed constitutional amendments must be adopted in compliance with constitutional requirements. Because Measure 7 violated the “separate-vote” requirement, it is void in its entirety.

Measure 7’s very structure is what in the end proved fatal. Measure 7 makes a distinction between “good” government regulation not deserving of compensation to the property owner, and “bad” government regulation that should give rise to a claim for compensation. “Good”

regulation limits the property owner's right to use his property in pursuit of sinful activities, such as selling pornography. "Bad" regulation limits a property owner's right to destroy natural habitat, open space, or archeological resources. Making a distinction between "good" and "bad" regulation, where the distinction is protected by freedom of speech concerns, is what made Measure 7 unconstitutional under Oregon law.

Leslie Keig