

## RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

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### I. CLEAN WATER ACT

#### *The Ninth Circuit Extends CWA Liability to Groundwater Discharges in Hawaii Wildlife Fund v. County of Maui*

##### A. Introduction

The United States Court of Appeals for the Ninth Circuit recently addressed whether “discharging effluent through groundwater into the [Pacific] [O]cean” requires a National Pollutant Discharge Elimination System (NPDES) permit under the Clean Water Act (CWA), and whether the CWA gives fair notice that these permits are required. *Hawaii Wildlife Fund v. County of Maui*, 881 F.3d 754, 759 (9th Cir. 2018). Defendant appellee, the County of Maui, appealed a district court order

that found the county violated the CWA when it discharged effluent into the Pacific Ocean through groundwater wells. *Id.* The Ninth Circuit upheld the district court's order concluding that the county's activities released pollutants from point sources into the ocean, the discharge was traceable to the point source into a navigable water, and that "the pollutant levels reaching the navigable water are more than *de minimis*." *Id.* at 765.

### *B. Background*

#### 1. Legal Background

The discharge of any pollutant into navigable waters from a point source is prohibited under the CWA. 33 U.S.C. § 1311(a) (2012). A point source is defined as a discernable conveyance, including a well. *Id.* § 1362(14). A party may obtain an NPDES permit to discharge pollutants from a point source into a navigable body of water. *Id.* § 1342(a)(1). The discharge of a pollutant from a point source into a navigable body of water without a NPDES permit is considered a violation of the CWA. *Hawaii Wildlife Fund*, 881 F.3d at 760 (quoting *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526, 532 (9th Cir. 2001)).

#### 2. Factual Background

The case concerned four wells at the Lahaina Wastewater Reclamation Facility (LWRF), which is owned and operated by the County of Maui. *Id.* at 758. The LWRF receives around four million gallons of sewage per day that is treated and injected into its groundwater wells. *Id.* Four of these wells, Wells 1, 2, 3, and 4, discharge some of the effluent-treated wastewater into the Pacific Ocean, all without an NPDES permit. *Id.* To determine the amount of effluent discharged into the ocean from the wells, the U.S. Environmental Protection Agency (EPA), the Hawaii Department of Health (HDOH), the U.S. Army Engineer Research and Development Center, and researchers at the University of Hawaii conducted a study, called the Tracer Dye Study. *Id.* at 759. The Tracer Dye Study injected tracer dye into Wells 2, 3, and 4 and monitored if and when the dye would enter the ocean. *Id.* The tracer dye injected in Wells 3 and 4, which conveyed the majority of the effluent, was found in the Pacific Ocean about eighty days after injection. *Id.* Although the Tracer Dye Study detected no tracer dye in the ocean from Well 2, the study found that if Well 2 were to receive the majority of the

effluent like Wells 3 and 4, it would yield the same result—the discharge of effluent into the ocean without a permit. *See id.*

### C. *The Court's Decision*

The Ninth Circuit held that the county needed to obtain an NPDES permit for the discharge. The court reasoned that the county needed a permit to discharge treated wastewater into the ocean from the wells because the wells were considered a point source with indirect discharges, and wells are not categorically excluded under the CWA. *See id.* at 762-65, 767. Initially, the court found that wells were clear examples of point sources because they discharged pollutants into a navigable body of water, noting that even the county admitted the wells were point sources. *Id.* at 760. To support its conclusion, the court compared the discharge from the wells to runoff from a highway. *Id.* at 761. Runoff from highways, the court pointed out, is not discretely collected and conveyed into a navigable body of water and thus would not be considered a point source; here, however, the four discrete wells did in fact directly collect and convey treated wastewater into a navigable body of water. *Id.* Thus, the court found that the wells were clearly point sources and any discharge from them required a NPDES permit. *See id.*

The county argued that the wells did not constitute point sources because they do not directly discharge pollutants into a navigable body of water and thus should be considered indirect discharges. *See id.* at 762. The court rejected that argument. *See id.* at 765. The court found that the county's argument—that only confined and discrete conveyances would be subjected to liability “where the point source itself directly feeds into the navigable water”—was contrary to the CWA liability several circuits have recognized, which does not require a direct connection. *Id.* at 764. The court pointed to Justice Scalia's plurality opinion in *Rapanos v. United States* for support, which stated that discharges that do not emit directly into navigable waters but pass through conveyances in between violate the CWA. *Id.* (citing *Rapanos v. United States*, 547 U.S. 715 (2006)).

The court also rejected the county's argument that wells are categorically excluded under the CWA. *Id.* at 766-67. The court found that “the plain language of the statute clearly permits States to issue NPDES permits for well disposals, and such permits are required only for ‘discharges into navigable waters.’” *Id.* at 766 (quoting 33 U.S.C. § 1342(b)). Further, the court rejected the county's argument that the CWA requires that only the state has the authority to regulate well disposals because the court previously concluded that the CWA does not

grant neither the EPA nor a state agency “the exclusive authority to decide” whether there is a CWA violation. *Id.*

Finally, the court rejected the county’s argument that it did not receive fair notice that a permit was required for its discharges from the wells into the Pacific Ocean. *Id.* at 768. The court supported its conclusion by pointing to the plain language in the CWA that clearly prohibits the discharge of pollution into a navigable water. *Id.* The court found that because it was undisputed that the county was discharging pollutants from point sources into the Pacific Ocean, “the [c]ounty had ‘fair notice’ its actions violated the CWA.” *Id.*

#### *D. Conclusion*

Ultimately, the Ninth Circuit found that a groundwater well that collects and conveys wastewater into a navigable body of water requires an NPDES permit, despite the fact that it may indirectly discharge pollutants into a navigable body of water. The court found that “to hold otherwise would make a mockery of the CWA’s prohibitions.” Thus, the court held that the county discharged effluent into the Pacific Ocean without a permit in violation of the CWA and had fair notice that its discharges into the Pacific Ocean were prohibited under the CWA.

Jamie Futral

## II. COMPREHENSIVE ENVIRONMENTAL RESPONSE COMPENSATION AND LIABILITY ACT

### *The Next Generation of Federal Facility Environmental Liability*

#### *A. Background*

Lead, total dissolved solids, and beryllium, oh my. In a pollution-weary nation recovering from climate catastrophes, contaminated drinking water, and oil spills, why scare everyone more with untold thousands of additional potential Superfund sites? Abandoned mines that present significant dangers to humans and the environment from acid mine drainage, blow-outs, heavy metal pollution, and tailing waste leakage are the next potential Superfund. These abandoned uranium and hard rock mines are located on both public and private lands. Obviously, not all mines are abandoned, but those that are on federal lands are emerging as the vanguard. Successor companies are often required to clean up the sites, unless the sites are orphaned with no identifiable

responsible parties. Is the federal government adequately addressing abandoned mines on federal lands?

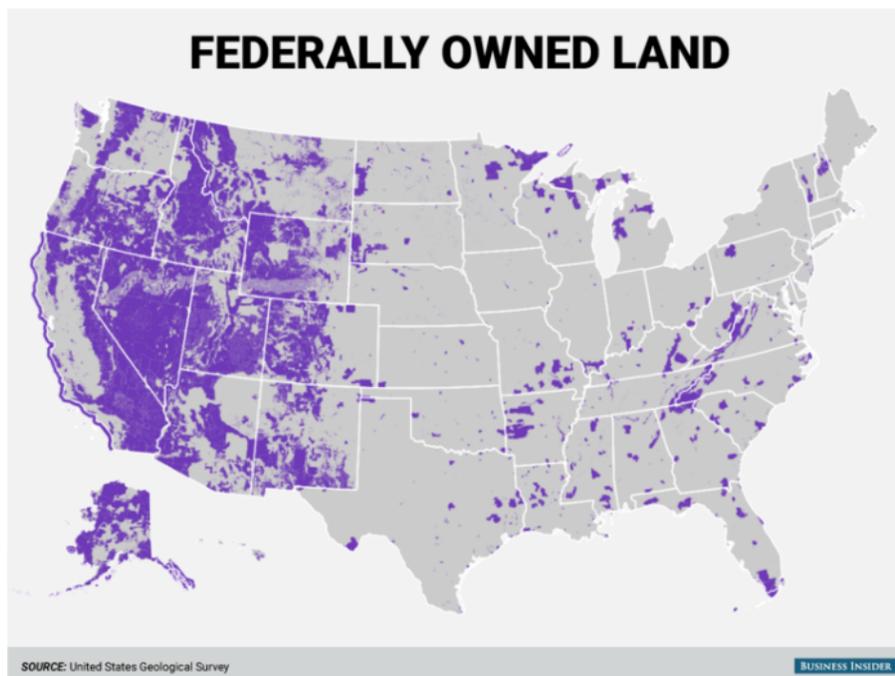
Since 1980, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) has been our nation's clean up statute to rectify past contamination. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 95-510, 94 Stat. 2767 (codified as amended in scattered sections of 42 U.S.C.). The United States Environmental Protection Agency (EPA) can clean up sites, seek clean-up cost recovery from defendants (called potentially responsible parties or PRPs), issue clean up abatement orders to PRPs for "imminent and substantial endangerment," and list the worst sites needing long-term remediation action on a National Priorities List (NPL). *See* 42 U.S.C. §§ 9604-9607 (2012). In turn, PRPs who clean up their sites can bring § 9607 cost recovery actions against other PRPs, or PRPs can seek § 9613 contribution claims against other PRPs when reimbursing the government for its cleanup costs. Liability for clean-up cost is often joint and several, but liability for contribution claims is equitable and based on many factors.

CERCLA clean up actions are used for a "release" or "threatened release" into the environment (air, surface or groundwater, soil, etc.) of a "hazardous substance" that causes "response costs." *See id.* §§ 9601(8), (22); 9607; 40 C.F.R. § 302.4 (2018). Generally, PRPs are current owners or operators of a facility, past owners or operators of a facility during disposal, arrangers of hazardous substance disposal or treatment, and/or transporters of hazardous substance to a site they select for disposal or treatment. Liability for arrangers and operators is usually steeper than for owners, depending on how passive or active owners are at contaminated sites, as discussed below. "Operators" are required to have day-to-day management of the environmental affairs at a contaminated facility. *See United States v. Bestfoods*, 524 U.S. 51, 66 (1998). Recently, courts have snagged the United States itself as an "owner" of facilities that released hazardous substances on public lands. Section 9620(a)(1) waives sovereign immunity of the United States both substantively and procedurally for liability under § 9607.

Mining on public lands helped develop the west and reinforced World War II efforts. Public federal lands compose about one-third of our nation and consist of national parks, BLM lands, national forests, tribal lands held in federal trust, defense facilities, and more (*see* Figure 1). A growing concern to the U.S. Congress is the thousands of abandoned mines on Department of Interior (BLM) and Department of Agriculture (USFS) lands that are not inventoried, assessed, or evaluated

under § 9620. See ENERGY & COMMERCE SUBCOMMS., OVERSIGHT OF FEDERAL FACILITY CLEANUP UNDER CERCLA (Sep. 11, 2015), <https://energycommerce.house.gov/hearings/oversight-federal-facility-cleanup-under-cercla/>.

Figure 1: Federally Owned Land  
(darkened below)



The first generation of federal site clean-up was on Department of Defense and Energy facilities (war plants) and has generated over thirty years of CERCLA litigation. See Robert M. Howard & Shawn T. Cobb, *Victory Through Production: Are Legacy Costs of War Scuttling the “GOCO” Model?*, 46 PUB. CONTRACT L.J. 259, 355, app. A (2017). Mines on public land are not new, but they represent the next generation of U.S. CERCLA liability. Some recent cases bear this out. Most mines on public land are not presently handled as federal facilities. See *id.* app. B, tbl.2; see also 40 C.F.R. § 300 (2018).

#### B. New Cases

In *Chevron Mining Inc. v. United States*, the United States was found liable in contribution claims on former BLM and other public lands for Chevron waste from the “non-federal” Questa NPL mining

sites. 863 F.3d 1261 (10th Cir. 2017); 40 C.F.R. § 300, app. B, tbl.1 (2018). Hazardous waste rock and mill tailings were disposed of in various areas including ponds. The ore was useful to the United States for steel production for defense and commercial purposes. The waste consisted of antimony, polychlorinated biphenyls (PCBs), arsenic, cadmium, lead, nitrate, sulfate, uranium, molybdenum, and others.

The historic mining was performed on land owned by the United States, although the mining claimant had superior rights over third parties. The Tenth Circuit Court of Appeals held that the United States was a CERCLA “owner,” as the United States held fee title to the land even though it did not have indicia of title or control over the actual mining lands. The court held that under CERCLA, “owner” has an ordinary meaning, but it remanded to the lower court the question of the equitable share of remediation costs to be paid by the United States. Passive ownership is one thing; active involvement with the mine production and waste is another. The court also held that the United States was not an “arranger” of waste disposal under the facts before it, as the United States did not possess or own the waste. Often, courts also use an “intent to dispose” factor for arranger liability. *Burlington Northern & Santa Fe Ry. Co. v. United States*, 556 U.S. 599 U.S. (2009).

In *El Paso Natural Gas Co. v. United States*, El Paso sought contribution from the United States as owner of contaminated tailings and waste on Navajo lands held in trust for the Indian tribes. No. CV-14-08165-PCT-DGC, 2017 WL 3492993 (D. Ariz. Aug. 15, 2017). The cost was for clean-up of nineteen historical uranium mining sites, although they were not on the NPL. The court cited *Chevron Mining* and held that the United States was an “owner” of the fee title in the lands even though it held the lands in trust. *Id.* The court deferred its rulings on the amount of U.S. equitable cost sharing and on whether the United States had any defense based on a fiduciary safe harbor to the limit of the trust’s value. *See id.*; *see also* 42 U.S.C. § 9607(n)(1) (2012).

In analogous circumstances, courts have held lessors/owners equitably liable from 0%-40% of clean-up costs for their lessee’s contamination, depending on how active or inactive the lessor was in causing the contamination. *See Halliburton Energy Service v. NL Industries*, 648 F. Supp. 2d 840 (S.D. Tex. 2010). The point of the *Questa* and *El Paso* cases is that despite the specific cost share the United States may ultimately have for clean ups, the United States can be found liable as a legal “owner” at an early stage of litigation.

*C. What Does This All Mean for Mine Clean Up on Public Lands?*

If the United States senses it will be a PRP on public lands, the EPA could retreat from future NPL mine listings or abatement orders, relax its oversight over clean ups on public lands, or oversee more lax clean ups on public lands. The EPA does not normally retreat. However, in this current administration, which has focused on less government regulation, anything is possible. *See* Juliet Eilperin et al., *New EPA Documents Reveal Even Deeper Proposed Cuts to Staff and Progress*, WASH. POST (Mar. 31, 2017), [https://www.washingtonpost.com/news/energy-environment/wp/2017/03/31/new-epa-documents-reveal-even-deeper-proposed-cuts-to-staff-and-programs/?utm\\_term=.81fa40d64714](https://www.washingtonpost.com/news/energy-environment/wp/2017/03/31/new-epa-documents-reveal-even-deeper-proposed-cuts-to-staff-and-programs/?utm_term=.81fa40d64714).

We are still at the beginning of the next generation of U.S. CERCLA liability for mines; therefore, much is unknown. However, the new U.S. EPA Administrator, Scott Pruitt, has continued a “Superfund Alternative Approach” (SAA) that retreats from NPL listing and favors private agreements with PRPs to speed up clean ups for seriously contaminated sites. *See Superfund Alternative Approach*, ENVTL. PROTECTION AGENCY (Oct. 10, 2017), <https://www.epa.gov/enforcement/superfund-alternative-approach>. This policy may not bode well for the thousands of abandoned mining sites on public lands.

The SAA protocol (originally OSWER Dir. 9200.2-125) calls for EPA to oversee clean ups, consistent with § 9621 clean-up standards, including appropriate or relevant and applicable regulatory requirements (ARARs) such as “BDAT” under Resource Conservation and Recover Act (RCRA) or “BAT” under CWA, if waste or water treatment is a clean-up remedy; involve the public; and conduct PRP settlement agreements through consent judgments or consent administrative orders. However, there are recent administrative trends that relax EPA oversight of such private clean ups, such as by reducing PRP “overhead” costs (which is mostly for EPA oversight). *See* Scott Pruitt, Memorandum to EPA Staffers on Prioritizing the Superfund Program (May 22, 2017). Furthermore, neither the Questa nor El Paso mines were handled as federal facilities on the NPL, and thousands of other similar older mines were simply abandoned.

There are only two mines on federal lands finally listed on the federal NPL—Beltsville Agricultural Research in Maryland and Fremont National Forest in Oregon. This lack of NPL listing for most contaminated mines on federal lands represents EPA’s limited authority under § 9620 over federal facilities in various agencies’ docketing, inventorying, and assessing their sites, unless the sites are eventually

listed and remediated on the NPL. This gap is a “Catch-22.” There are many disconnects between EPA’s own federal hazardous waste docket and federal agencies’ independent but related CERCLA actions. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-35, HAZARDOUS WASTE: AGENCIES SHOULD TAKE STEPS TO IMPROVE INFORMATION ON USDA’S AND INTERIOR’S POTENTIALLY CONTAMINATED SITES 7, 16, 21, 28, 34, 35, 38, tbls. 1-2, app. IV (2015). BLM has over 1000 known abandoned mines to address (and possibly 30,000 to 100,000 additional sites not addressed); NPS has over 1200; Bureau of Indian Affairs, Bureau of Reclamation, and Fish and Wildlife Service possibly have hundreds; and USFS has 1400. *Id.* Many of these abandoned mines were simply “lost” to EPA for years, if not decades, as many federal agencies dragged their feet.

*D. Who Else Can Act if the EPA Fails?*

Section 9659 of CERCLA covers citizen suits and allows such suits against any “person,” including U.S. instrumentalities or agencies, who are alleged to be in violation of CERCLA, or against the President or other federal officials for their failure to perform any act or duty under CERCLA, including under § 9620, which covers federal facilities. 42 U.S.C. § 9620, 9659 (2012). There are procedural restrictions to citizen lawsuits, including pre-suit notice and lawsuit bars during CERCLA clean up or when there is diligent enforcement by EPA under CERCLA or RCRA against a violator. See *id.* § 9613(h). Subsection (h)(4) limits judicial challenges to EPA removal, remedial action, and abatement orders, except where the removal or remedial action taken or secured under an abatement order is alleged to be in violation of CERCLA, e.g., not protective of human health and the environment or pursuant to ARARs under § 9621(d). Thus, remediation, removal, or abatement action must first be accomplished before there can be any judicial review. See, e.g., *Boarhead Corp. v. Erickson*, 923 F.3d 1011, 1018 (3d Cir. 1991). After-the-fact review of clean up actions already taken is hardly satisfactory over immediate reviews.

If the EPA or agencies fail to inventory, preliminarily assess, or evaluate federal hazardous waste facilities pursuant to § 9620(b) and (c), it is likely a government failure to perform a mandatory CERCLA duty can be judicially rectified by court order. However, under Pruitt’s SAA, a purely private clean up may not be protected by these § 9613(h) time bars unless the SAA agreement is coupled with a consent abatement order or judicial consent decree, procedures that are traditionally expected.

Thus, “persons” under § 9601(21), which includes private citizens, states, and municipalities, may still have grounds to challenge inadequate clean up actions after the fact or to challenge federal agency inaction under CERCLA § 9620 up front, but only if they have legal “standing” on any federal lands that are involved. Federal lands are vast, and to have standing, citizens must show imminent environmental harm or injury, rather than mere generalized or future harm on the area they use or visit that is affected. *See Summers v. Earth Island Institute*, 55 U.S. 488 (2009). For example, citizens should not have to prove disruption from hunting occurring exactly on mine premises to achieve standing, but they may have enough environmental injury if they are concerned about and refrain from canoeing on a river downstream from a mine due to a threatened chemical release.

States may also be able to use their delegated RCRA authority on exclusive federal enclaves due to waiver of sovereign immunity for state and local solid or hazardous waste laws. 42 U.S.C. § 6961 (2012). Federal lands, whether overseen by EPA under CERCLA or not, are still subject to authorized state hazardous waste closure orders. *United States v. Colorado*, 990 F.2d 1565 (10th Cir. 1993), *cert. denied* (1994). Indian lands may remain immune from state laws.

To the extent Native Americans may be affected on tribal lands, they may have a CERCLA claim, but they have to consider the risk of waiving sovereign immunity for a recoupment counterclaim under CERCLA if they bring a CERCLA court action. *See Berrey v. Ascarco, Inc.*, 439 F.3d 636 (10th Cir. 2012). Of course, toxic tort lawsuits for personal or property damage can be brought if the common law elements of proof are met.

### C. Conclusion

Abandoned mines should not be ignored as “porch children” simply because they exist on public lands. EPA and federal agencies should continue to handle these legacies as diligently as most DOD and DOE forces did on their contaminated lands and as responsible private parties usually do. After all, waste is a terrible thing to mine.

Stan Millan, SJD

## III. ENDANGERED SPECIES ACT

*The Meaning of Essential Habitat Under the ESA*

The United States Supreme Court recently granted *certiorari* to review a decision by the United States Court of Appeals for the Fifth Circuit regarding the United States Fish and Wildlife Service's (FWS) designation of an area, which included privately owned lands unoccupied by the species in question, as a critical habitat of the Dusky Gopher Frog under the Endangered Species Act (ESA). *Markle Interests, L.L.C. v. United States Fish & Wildlife Service*, 827 F.3d 452, 458 (5th Cir. 2016), *cert. granted sub nom., Weyerhaeuser Co. v. United States Fish & Wildlife Service*, 86 U.S.L.W. 3365 (U.S. Jan. 22, 2018) (No. 17-71). The court below upheld the FWS' designation, taking particular care to note that "misconceptions exist about how critical-habitat designations impact private property." *Id.* at 458.

The ESA exists to protect species that are running the risk of going extinct, and more pertinently, "includes an express purpose of conserving 'the ecosystems upon which endangered species . . . depend.'" *Id.* at 478 (quoting 16 U.S.C. § 1531(b) (2012)). The court addressed a number of questions, including that of the landowner's standing and its reliance on the concreteness of an injury caused by a potentially lowered property value, as well as a number of administrative law questions regarding the level of deference owed to the FWS' decision. *Id.* at 459-63. The core arguments raised by the landowners were that the FWS' decision violated the ESA and Administrative Procedure Act (APA), that the decision exceeded the agency's constitutional authority under the Commerce Clause, and that the decision violated the National Environmental Policy Act. *Id.* at 460. The court found none of the landowner's arguments persuasive, couching its decision in language that sought to reassure those worried about an apparent government overreach. *Id.* at 458. To that end, the court stated that "the Fish and Wildlife Service cannot force private landowners to introduce endangered species onto their land or to make modifications to their land" and that "[i]n short, a critical-habitat designation alone does not require private landowners to participate in the conservation of an endangered species." *Id.* Much of the Fifth Circuit's discussion under the arguments pertaining to the ESA and APA revolved around the meaning of the term "essential" as it relates to the standard necessary for the FWS to designate a critical habitat.

### A. Background

The care taken in the Fifth Circuit's opinion reflects the tremendous challenge the designation has faced since the issue has been framed as government overreach. Indeed, this particular designation has been pointed to as a means by which the federal government may compel private landowners to make changes to their lands *absent* a valid cause, especially on politically reactionary but, nonetheless, influential news sites. See Henry I. Miller, *The Case of the Missing Frog*, WASH. TIMES (Dec. 17, 2017), <https://www.washingtontimes.com/news/2017/dec/17/government-overreach-is-at-center-of-weyerhaeuser>. Here, cause for concern among the landowners was driven by the absence of the frog in the lands designated as critical habitat, particularly in St. Tammany Parish, Louisiana. *Markle Interests*, 827 F.3d at 459 (citations omitted). Pushback to the opinion below is quite evident following a cursory search around the Internet, and the root of that pushback stems, as noted in the Henry Miller article above, from what he terms "The Case of the Missing Frog." Miller, *supra*. This is despite the Court of Appeals' citing language in the ESA, which clearly envisions a procedure for designating critical habitat that is not currently occupied by the species in question:

The ESA expressly envisions two types of critical habitat: areas occupied by the endangered species at the time it is listed as endangered and areas not occupied by the species at the time of listing. . . . To designate unoccupied areas, the Service must determine that the designated areas are "essential for the conservation of the species."

*Id.* at 464. Accordingly, the Supreme Court's decision to grant *certiorari* suggests that such a review will not be one that examines the Fifth Circuit's application of an apparently clear law. Instead, the Supreme Court's review will likely be one that either (1) attempts to declaw the FWS' critical designation ability by construing the phrase "essential for the conservation of the species" narrowly or (2) examines the constitutionality of these designation powers as a whole, likely under the context of the regulatory takings doctrine. An examination of the Fifth Circuit's decision demonstrates that the Supreme Court will likely look into the meaning of the term "essential" as it was applied by the FWS.

### B. Court's Decision

The court first discussed the preliminary issue of standing. Upon finding that landowners had a concrete, particularized injury through the possible loss in value of their lands, the court moved to the critical issue of the FWS' designation. Here, the record of scientific evidence, which

the FWS had used in support of its designation, was not disputed. Rather, the landowners argued that the FWS had overstepped its statutory authority because land that was not currently supporting a species could not possibly be considered “essential for the conservation of the species.” *Markle Interests*, 827 F.3d at 467. Allowing such a designation, the petitioners argued, would give the FWS “nearly limitless authority to burden private lands with a critical habitat distinction.” *Id.* at 471. The argument, the court found, turned on the definition of the word “essential.” *Id.* Because the ESA does not contain a congressional definition of the term, the court afforded broad *Chevron* deference to the FWS in its interpretation, citing *Knapp v. United States Department of Agriculture*, in applying this deference to a “reasonable construction of an ambiguous statute.” *Id.* at 468. In doing so, the court rejected a plain meaning argument from the landowners regarding the term “essential,” which, according to the court, conflated the standards in the ESA for determining whether to designate occupied versus unoccupied land at the time of designation. *Id.*

The next argument regarding the word “essential” was based upon a failure of the FWS’ interpretation thereof to place “meaningful limits” on the FWS’ power under the ESA. *Id.* at 470. This argument contended that by allowing the agency to designate an area that did not currently support a species, this interpretation of “essential” would allow FWS to designate *any* stretch of land that could conceivably be altered to support a given endangered species. *Id.* at 471. The court dismissed this argument as a “parade of horrors” and noted that in selecting the designated lands the FWS focused on the presence of a particular feature (ephemeral lakes), which were necessary for the frogs’ survival and had historically supported frog populations. *Id.* The court distinguished the FWS’ reasoned scientific analysis of appropriate frog habitats (which included establishing the rarity of the critical ephemeral pond feature) from the arbitrary selection of random pieces of land, which the petitioners warned should keep the FWS’ designation. *Id.*

The court went on to address the landowners’ arguments under the Commerce Clause and NEPA, both of which it found inadequate. *Id.* at 477, 479. However, Judge Priscilla Owen’s dissent again discussed the nature of the term “essential.” *Id.* at 480 (Owen, J., dissenting). The dissent argued that the majority and the FWS treated “essential” as an overly broad term because the land in question did not and currently *could not* support a population of the frogs in question. *Id.* at 481. The dissent joined in the landowners’ fear that because the land was not currently capable of supporting the frog, allowing a designation of it as a

critical habitat would open the door for designations ever-further from the true meaning of “essential” under the Act. *Id.*

### C. Conclusion

The Fifth Circuit allowed the FWS to adopt a broad definition of the term “essential” for the purpose of designating critical habitats currently unoccupied by an endangered species. Despite the clear language of the ESA, which creates different standards for the FWS’ designation of land that is occupied and unoccupied by an endangered species, there has been considerable concern that such a broad definition of “essential” for the purposes of habitat designation will unnecessarily burden property rights. The Supreme Court’s decision to grant *certiorari* to the Fifth Circuit’s decision will likely result in a reexamination of the term “essential.” Indeed, such an examination is likely to limit the language “essential to the conservation of an endangered species” significantly.

Robert Tornillo

## IV. FREEDOM OF INFORMATION ACT

### *Third Party Contractors Who Work with Federal Agencies to Generate Environmental Impact Statements Are Not Required to Release Their Documents Under the FOIA*

The United States Court of Appeals for the Tenth Circuit recently considered if an agency had to disclose materials created by a third-party contractor for the purposes of the Freedom of Information Act (FOIA). *Rocky Mountain Wild, Inc. v. United States Forest Service*, 878 F.3d 1258 (10th Cir. 2018). The FOIA provides an individual, including a company, with the ability to request “existing, identifiable, and unpublished agency records” from federal agencies. WENDY GINSBERG, CONG. RESEARCH SERV., R41933, THE FREEDOM OF INFORMATION ACT (FOIA): BACKGROUND, LEGISLATION, AND POLICY ISSUES 1 (2014). The question at issue was whether the requested documents from a third-party contractor were considered agency records under the FOIA. *Rocky Mountain Wild*, 878 F.3d at 1260. In *Rocky Mountain Wild*, the Tenth Circuit concluded that the third-party documents were not considered agency records if the agency did not “create, obtain, or control” the materials. *Id.* at 1265.

### A. *Background*

Rocky Mountain Wild filed a FOIA request to seek and obtain information regarding a potential land exchange between the federal government and a private company, Leavell-McCombs Joint Venture (LMJV). *Id.* at 1260. This swap was for private land in exchange for federal land located in the Rio Grande National Forest. *Id.* As part of the FOIA request, the United States Forest Service (USFS) agreed to provide Rocky Mountain Wild with the majority of the requested materials except for documents that the third-party contractor, Western Ecological Resource, Inc. (Western Ecological), “possessed” but never shared with the USFS. *Id.* USFS argued that the third-party documents were not considered agency records under FOIA and thus, did not have to share the requested information with Rocky Mountain Wild. *Id.* at 1261.

As part of the memorandum of understanding between LMJV and the USFS, LMJV agreed to hire a third-party to conduct an environmental impact study (EIS) for the proposed land exchange. *Id.* at 1260. After LMJV selected and entered into an agreement with Western Ecological, Western Ecological conducted an EIS, which the USFS released as a draft for public comment and then published as a final EIS. *Id.*

The United States District Court for the District of Colorado held that the documents were not agency records, and therefore, the USFS did not have to disclose to Rocky Mountain Wild the third-party documents that the agency neither saw nor relied upon. *Id.* at 1261. The Tenth Circuit affirmed the decision. *Id.* at 1265.

### B. *Court's Decision*

To determine whether documents are considered agency records, the Tenth Circuit relied on a two-prong test set out in the Supreme Court case *United States Department of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). *See Mountain Wild*, 878 F.3d at 1261. Under the test, first, “an agency must either create or obtain the requested materials” and second, “the agency must be in control of the requested materials at the time the request was made.” *Id.* (quoting *Tax Analysts*, 492 U.S. at 144-45) (internal quotations omitted).

The Tenth Circuit found that the USFS did not meet the first prong because Western Ecological created the materials in question. *Id.* at 1261, 1263. The court reasoned that “there must be substantial federal supervision of the private activities” to satisfy this prong. *Id.* at 1261. Furthermore, the court noted that although the agreement between

LMJV and Western Ecological included that the USFS would supervise the EIS's preparation, USFS only had meetings and briefings with Western Ecological to discuss tasks to be completed and did not have "detailed control over the contractor's day-to-day performance that would make the contractor a federal instrumentality or FOIA agency." *Id.* In addition, the court stated that "[i]f the materials were not created by the agency itself and were never acquired by the agency, the materials are not agency records even if they were prepared by a contractor acting on the agency's behalf." *Id.* at 1262 (internal quotations omitted).

In addition, the Tenth Circuit concluded that the USFS did not meet the second prong of the agency record test set out in *Tax Analyst* regarding control of the requested materials. *Id.* at 1264. Control is defined as "the materials have come into the agency's possession in the legitimate conduct of its official duties." *Id.* at 1263 (quoting *Tax Analysts*, 492 U.S. at 145) (emphasis omitted). The court rejected Rocky Mountain Wild's argument that the agency could have had control of the documents in question because of the memorandum of understanding between LMJV and the USFS and the agreement between LMJV and Western Ecological. *Id.* The court reasoned that the FOIA deals with records that are obtained and not records that the agency could have acquired. *Id.* Therefore, the court stated that "because the Forest Service never possessed the contractor documents, it could not have controlled them at the time of the FOIA request." *Id.* at 1264.

The Tenth Circuit also rejected Rocky Mountain Wild's argument that the third-party documents are agency records through contract. *Id.* A provision within the LMJV and Western Ecological agreement provides that the contractor's work product "will be considered Forest Service work product belonging to the Forest Service." *Id.* The court reasoned that although the Supreme Court held in *Forsham v. Harris*, 445 U.S. 169, 180-81 (1980), that "nonownership suggests that a document is not an agency record. It is an inverse error to infer . . . that ownership necessarily means that a document is an agency record." *Id.* (emphasis omitted).

### C. Conclusion

The Tenth Circuit held that the third-party documents were not agency records under the FOIA, and thus, the USFS did not have to provide Rocky Mountain Wild with the third-party documents. The court found that the documents did not meet the test set out in *Tax Analyst*. The court determined that the USFS did not create nor have possession or control of the third-party documents, and thus the

documents were not considered agency records. This decision appears to be a win for third-parties and a loss for the public. Moreover, Congress can play a role in strengthening the FOIA to ensure that certain documents, including third-party documents, are available to the public for accountability and transparency purposes.

Diem Ha

## V. MIGRATORY BIRDS TREATY ACT

### *No Harm, No Owl*

The United States Court of Appeals for the Ninth Circuit addressed whether the Migratory Birds Treaty Act (MBTA) permits the United States Fish and Wildlife Service (FWS) to remove birds of one species for scientific purposes that benefit a different species. *Friends of Animals; Predator Defense v. United States Fish & Wildlife Service*, 879 F.3d 1000, 1001 (9th Cir. 2018). The United States District Court for the District of Oregon dismissed the suit on the grounds that no provision in the MBTA, or the international conventions it implements, limits scientific purposes to the taken species. *Id.* at 1003. The Ninth Circuit Court of Appeals affirmed. *Id.* at 1010.

#### A. Background

This case arises out of two species of owl competing for territory. The primary habitats for the northern spotted owl are the Cascade Mountains in Oregon and the Klamath Mountains in southwestern Oregon and northwestern California. *Id.* at 1001. In 1990, the FWS determined the northern spotted owl was a threatened species under the Endangered Species Act. *Id.* The owl's population declined due to the loss of old-growth forest habitats in which the species lives. *Id.*

The barred owl habitat spread from its native eastern United States to the same habitat of the northern spotted owl. *Id.* The barred owl now significantly outnumbers the northern spotted owl. *Id.* The two species' diets overlap by about 76%, and the barred owl may be so aggressive that it displaces spotted owls with physical attacks. *Id.* at 1002. This invasion by the barred owl is another factor that contributed to the decline of the already endangered northern spotted owl.

In an effort to help the northern spotted owl population recover, the FWS issued a recovery plan in 2008. *Id.* at 1002. In its plan, FWS noted that the spread of the barred owl posed a significantly greater threat to

the northern spotted owl's recovery than it did when the species was first listed as endangered in 1990. *Id.* FWS recommended the implementation of large-scale control experiments in northern spotted owl habitats to observe the ecological interactions between the northern spotted and barred owls. *Id.* After undergoing the notice and comment process to prepare an Environmental Impact Statement, FWS settled on an experimental design to take about 3600 barred owls over four years. *Id.*; see Final Environmental Impact Statement, 78 Fed. Reg. 44, 588 (July 24, 2013).

FWS issued a scientific collecting permit (permit) for lethal and nonlethal take as required under the MBTA. *Friends of Animals; Predator Defense*, 879 F.3d at 1002. The Oregon Fish and Wildlife Service received the permit, and in 2014 requested a modified permit reducing the total take from 3600 to 1600 barred owls due to delays caused by funding issues. *Id.* FWS granted the modification, and in an accompanying memorandum, it explained that the taking of barred owls will advance the scientific understanding of both species of owls. *Id.*

Friends of Animals and Predator Defense (Friends), two not-for-profit animal advocacy organizations, objected to FWS killing one species of owl in order to conserve another. *Id.* Friends filed suit in the Eastern District of California to challenge the permit, but the case was dismissed for lack of standing because the only member of Friends who claimed injury could not show that he had "concrete plans" to visit an area that would be affected by the take. *Id.* at 1002-03; see also *Friends of Animals v. Jewell*, No. 13-CV-02034, 2014 WL 3837233, at \*5 (E.D. Cal. Aug. 1, 2014).

In September 2014, Friends filed this suit, alleging the FWS violated the MBTA and the National Environmental Policy Act. *Friends of Animals; Predator Defense*, 879 F.3d at 1003. Friends argued that under the MBTA, the species that FWS takes for scientific purposes must be the same species intended for conservation. *Id.* The district court dismissed the claim on the grounds that nothing in the MBTA limits the scientific purposes for why the species is taken. *Id.*

### *B. Court's Decision*

Friends appealed the district court's decision on the MBTA claim only. Their argument was based on the "same-species theory," which posits that the FWS take permits must be intended to advance the conservation or scientific understanding of the same species being taken. *Id.* at 1003. The court began with the text of the statute. The MBTA makes it unlawful to take any migratory bird covered under the Act

unless “permitted by regulations” provided in the Act. *Id.*; 16 U.S.C. § 703(a) (2012). The Secretary of the Interior is authorized and directed to determine when the MBTA allows take and to adopt suitable regulations permitting it. *Friends of Animals; Predator Defense*, 879 F.3d at 1003 (quoting 16 U.S.C. § 704(a)). Applications to take migratory birds for scientific purposes must “describe the species and number of birds to be taken, the location of collection, [and] the purpose of the research project.” 50 C.F.R. § 21.23(b) (2018). The court noted that the MBTA does not impose many substantive conditions and gives the Secretary of the Interior broad discretion. *Friends of Animals; Predator Defense*, 879 F.3d at 1004.

Since the MBTA does not have many substantive provisions, Friends argued that the Mexico Convention referenced in the MBTA protects the owls. *Id.* at 1004. The Mexico Convention requires that Mexico and the United States establish “close seasons” that prohibit the taking of migratory birds during certain periods of the year, with the exception for taking birds when “used” for scientific purpose, propagation, or for museums. *Id.* at 1004-05. Friends argued that the exception provision must comply with the same-species theory because the word “use” indicates that the owls must still be used and not eliminated. *Id.* at 1005. FWS responded that all barred owls taken under the permit will be used for scientific purposes to study effects on surrounding environments and any remains donated to public educational and research institutions. *Id.*

The court noted that FWS previously issued take permits that do not benefit the taken species. These included permits to take barn owls to research human hearing and hummingbirds to research flight aerodynamics. *Id.* These satisfied part of Friends’ theory, but not the same-species theory, so the court had to determine what “use” in the Mexico Convention meant. *Id.* In *Smith v. United States*, the Supreme Court determined that “use” means “to employ” or “to derive service from.” *Id.* at 1005-06 (quoting *Smith v. United States*, 508 U.S. 223, 229 (1993)). Adopting a broad definition, the court determined that using the owls for a scientific purpose and removing a bird to “procure its demise” fit within the definition, thereby agreeing with FWS’s interpretation. *Id.* at 1006. The court noted that under Friends’ interpretation, FWS could take the owls to display them in a museum but could not take them to prevent the extermination of the spotted owls. *Id.*

Friends put forth a second argument that the canon of *noscitur a sociis*, the notion that words grouped in a list should be given related meaning, indicates the same-species limitation in the Mexico

Convention. *Id.* at 1007. Friends argued that birds are taken for propagation or museums; the bird is being used for the propagative or museum purpose, so the birds must be used for scientific purposes if that is the reason for the take. *Id.* at 1008. The court rejected this argument because, as the court reasoned, in order for this canon to apply, the words must have some quality in common, and propagation, museums, and scientific purposes do not have an obvious common denominator. *Id.*

Friends' final argument was that FWS's definition of scientific purposes was a slippery slope that would authorize them to kill any migratory bird for any scientific purpose, no matter how unrelated the reason. *Id.* FWS argued that this experiment is for a "bona fide scientific study" and would have a "negligible impact on the barred owl population." *Id.* at 1008-09. The court agreed with FWS, finding that reading articles I and II of the Mexico Convention together assured the covered species may not be exterminated, and that the conservation purposes may still be achieved without the same-species limitation. *Id.* at 1009.

### C. *Analysis*

Although the thought of killing owls does not appeal to anyone, the court here correctly interpreted the MBTA. If the end goal of the MBTA and other conservation treaties is to protect and conserve migratory and/or endangered birds, then the decision here accomplished that. The experiment by FWS will have a minute impact on the barred owl population but may significantly help restore the northern spotted owl population. The decision here allows the FWS to continue conservation experiments and ensures the Secretary of the Interior will have discretion in the matter, without allowing the take permits to run rampant.

Hannah Polakowski

## VI. STANDING

### Western Watersheds Project v. Grimm, *Concurrent State and Federal Wolf Management Precludes Plaintiff Standing*

#### A. *Introduction*

The United States District Court for the District of Idaho recently considered a claim by several nonprofit wildlife advocacy organizations that a United States Department of Agriculture (USDA) service violated

the National Environmental Policy Act (NEPA) by expanding its wolf-control program without properly considering the environmental impacts of the decision. *Western Watersheds Project v. Grimm*, No. 1:16-cv-218-ELJ-CWD, 2018 WL 495671, at \*1 (D. Idaho Jan. 4, 2018). Plaintiffs, a group of organizations including the Western Watersheds Project, Center for Biological Diversity, Friends of the Clearwater, WildEarth Guardians, and Predator Defense, “place a high priority on protecting and conserving wolves in their natural habitats in Idaho.” *Id.* Defendant Wildlife Services is part of the USDA’s Animal and Plant Health Inspection Service (APHIS) and conducts wildlife control programs for federal, state, and local agencies, as well as private individuals and organizations. *Id.* The dispute stemmed from Wildlife Services’ 2011 Environmental Assessment entitled *Gray Wolf Damage Management in Idaho for Protection of Livestock and Other Domestic Animals, Wild Ungulates, and Human Society* (2011 EA). *Id.* As a result of the Environmental Assessment, Wildlife Services issued a Finding of No Significant Impact (2011 FONSI) and concluded that its proposed wolf-management activities in Idaho did “not constitute a major federal action significantly affecting, individually or cumulatively, the quality of the human and natural environment,” thus precluding a more intensive Environmental Impact Statement (EIS). *Id.* The plaintiff environmental organizations disagreed and requested that the United States District Court for the District of Idaho reversed and set aside the 2011 EA and 2011 FONSI and required Wildlife Services to comply fully with NEPA before continuing to manage wolves in Idaho. *Id.*

## *B. Background*

### 1. Factual Background

Wolves are traditional predators of North American ungulates such as deer and elk. *Id.* at \*2. As settlers spread west across the continent, wolves began to prey on domestic livestock. *Id.* Over time, human efforts to protect livestock and eliminate wolves greatly diminished North American wolf populations. *Id.* As a result, the United States Fish and Wildlife Service (USFWS) listed the Northern Rocky Mountain (NRM) gray wolf as an endangered species in 1974. *Id.* In Idaho, Wildlife Services has assisted the Idaho Department of Fish and Game (IDFG) and the USFWS in managing wolves ever since the species was listed as endangered. *Id.* All three agencies believe effective wolf management is an important component of wolf recovery. *Id.* Wildlife Services is contracted by the USFWS and IDFG to manage predatory

wolves expertly and efficiently to reduce conflict between the wolves and humans, thus reducing the risk of nonselective and indiscriminate human control efforts that might threaten wolf recovery in the long term. *Id.*

Over the course of several decades, the USFWS proceeded with federal efforts to reintroduce and manage gray wolf populations in the American West. *Id.* at \*2-5. In 1987 USFWS approved the Northern Rocky Mountain (NRM) Wolf Recovery Plan, which aimed to remove the NRM gray wolf from the endangered and threatened species list by reintroducing and managing viable breeding populations of wolves in key areas of their native ranges. *Id.* at \*2. In 1994, the USFWS issued a final Environmental Impact Statement (EIS) entitled *The Reintroduction of Gray Wolves into Yellowstone Park and Central Idaho*. *Id.* at \*3. Both the 1987 Recovery Plan and the 1994 EIS indicate that federal wolf-control efforts are important methods of ensuring overall wolf survival. *Id.* In January 1995, the USFWS first began to reintroduce NRM gray wolves into central Idaho. *Id.* In light of the successful reintroductions, USFWS issued a final rule in February 2007 delisting the NRM gray wolves from the threatened and endangered species list. *Id.* at \*4. The delisting decision was enjoined by the United States District Court for the District of Montana in 2008 and vacated and remanded back to the USFWS. *Id.* The USFWS issued an amended final delisting rule in 2009, which delisted some populations of gray wolves, but not others. *Id.* This new rule was similarly vacated in 2010 by the same federal court; however, the delisting decision was later reinstated by Congress on May 5, 2011. *Id.* at \*5. As a result of the final congressional decision to delist the wolves, primary responsibility for managing wolves in Idaho transferred from USFWS to IDFG and the Nez Perce Tribe. *Id.*

After federal delisting of the gray wolves, the IDFG Commission directed IDFG to manage wolves consistent with the goals and objectives of the previously formed 2002 Wolf Conservation and Management Plan (State Wolf Plan). *Id.* The State Wolf Plan, among other objectives, endeavored to manage wolves in numbers that would not adversely affect big game populations and constituents who depend on them, and to minimize human conflicts “by coordinating with Wildlife Services to achieve prompt response to notifications of wolf depredation and prompt resolution of conflicts.” *Id.* Notably, the State Wolf Plan authorizes IDFG to evaluate and use sport hunting as a management tool to maintain ideal wolf population levels. *Id.* In 2009, IDFG held a single wolf-hunting season in which 188 wolves were killed; however, the season ended with the aforementioned District of Montana’s *vacatur* of USFWS’ 2009 delisting decision. *Id.* at \*6. Since Congress eventually

delisted the NRM wolves in 2011, IDFG has continued to manage wolves under the 2002 State Wolf Plan. *Id.*

Wildlife Services continues to play a role in wolf management in Idaho. *Id.* In August 2010, Wildlife Services, in cooperation with IDFG, issued a draft Environmental Assessment entitled *Gray Wolf Damage Management in Idaho*, which was subsequently revised in 2010 (Revised Draft EA). *Id.* During the public notice and comment period, Plaintiffs submitted comments arguing that the Revised Draft EA was biased toward lethal wolf management, that killing wolves in several specific zones to boost ungulate herds was improper and unjustified, and that Wildlife Services needed to prepare an EIS. *Id.* In light of the listing-delisting battle that was playing out in the courts, Wildlife Services issued the revised and final 2011 EA, which analyzed the potential environmental impacts of alternatives for Wildlife Services' involvement in NRM gray wolf management under the direction of the responsible wolf management agency. *Id.* The responsible wolf management agency in the plan could be either USFWS or IDFG depending on the wolf's current listing status. *Id.* The final EA examined several alternatives outlining the scope of Wildlife Services' involvement in wolf management in Idaho. *Id.* at \*6-7. Wildlife Services selected an alternative that involved continuing the existing program (IDFG management) while allowing Wildlife Services to assist IDFG upon request for lethal management of wolves impacting ungulate or livestock populations. *Id.* at \*7. The Plaintiffs then challenged the adequacy of the 2011 EA and subsequent 2011 FONSI.

## 2. Legal Background

Plaintiffs argued that the Defendants' decision to adopt the 2011 FONSI violated NEPA because the defendant (1) did not include a "hard look" analysis in the 2011 EA; (2) did not prepare an EIS; and (3) did not conduct a supplemental NEPA analysis, which was required due to new information and circumstances that had arisen since the issuance of the 2011 EA. *Id.* at \*9. Defendants, *inter alia*, argued that Plaintiffs lacked standing because they could not show the relief they sought would redress their alleged injuries. *Id.*

Standing under Article III of the United States Constitution requires a concrete, particularized, and actual or imminent injury that is fairly traceable to the challenged conduct and is likely to be redressed by a favorable ruling. *Id.* (citing *Clapper v. Amnesty International USA*, 568 U.S. 398, 409 (2013)). To have standing to bring a procedural NEPA claim, a plaintiff must show that the procedure in question protects a

threatened concrete interest that forms the basis for standing, i.e., injury-in-fact. Injury-in-fact is adequately alleged if a plaintiff can show they use the affected area and that the challenged activity will lessen the aesthetic and recreational values of the area. *Id.* at \*9. Once a plaintiff establishes a concrete injury, the causation and redressability requirements are somewhat relaxed. *Id.* at \*10. “Plaintiffs alleging procedural injury must show only that they have a procedural right that, if exercised, *could* protect their concrete interests.” *Id.* (citing *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1226 (9th Cir. 2008)).

### C. Court’s Decision

Ultimately, the court found in favor of Defendants, finding that Plaintiffs lacked standing because the relief that they sought would not redress their injuries. *Id.* at \*9. In particular, the court found that even if Wildlife Services was precluded from killing wolves in Idaho, other parties including IDFG would continue to do so. *Id.*

Initially, the court found that there was no dispute by Defendants that Plaintiffs had set forth sufficient facts to support an injury in fact. *Id.* at \*11. Assuming *arguendo* that Plaintiffs demonstrated an injury, the court noted that causation and redressability requirements were relaxed and that Plaintiffs only needed to show that the relief they sought “*could* protect their concrete interests.” *Id.* (citing *Salmon Spawning*, 545 F.3d at 1226). Even with these relaxed standards, however, Plaintiffs failed to meet their burden of showing that preclusion of Wildlife Services from engaging in wolf management activities pending a full EIS would result in fewer wolf killings or more wolves present in Idaho. *Id.* In essence, the court found that Idaho, or IDFG in particular, would retain the authority and ability to manage wolves in Idaho even in Wildlife Services’ absence. *See id.* at \*11-14. As a result, the relief requested by Plaintiffs would not ensure their injuries were redressed. *Id.* at \*11.

The court outlined four reasons for its finding. First, IDFG has been the agency responsible for managing wolves in Idaho since the wolves were delisted in 2011. *Id.* Particularly, the 2002 State Wolf Plan gave IDFG the specific authority to both use, or authorize the use of, lethal control of wolves to protect livestock and wild ungulate populations. *Id.* at \*12. Second, the court pointed to an affidavit by the Assistant Chief of Wildlife for IDFG, which stated that IDFG had the authority and clear ability to effectively manage wolves without Wildlife Services’ involvement. *Id.* Although IDFG contracted often with Wildlife Services to perform wolf management, this arrangement was

not exclusive, and IDFG had its own independent capability and support services necessary for wolf management. *Id.* Third, the State of Idaho has the necessary financial resources to pay for future lethal wolf control efforts and even has a legislatively created Wolf Depredation Control Board tasked with funding such efforts. *Id.* Fourth, because IDFG manages wolves under an adaptive approach outlined in the 2011 EA, the concern that wolves would be removed for one reason, such as livestock and ungulate protection, would likely be mitigated because fewer wolves would correspondingly be removed for other reasons, such as sport hunting. *Id.*

According to the court, its decision was also supported by Ninth Circuit case law. The court distinguished *WildEarth Guardians*, upon which Plaintiffs relied heavily, from the current case. *Id.* at \*13-14; *WildEarth Guardians v. United States Department of Agriculture*, 795 F.3d 1148 (2015). *WildEarth Guardians* involved nearly identical facts. *WildEarth Guardians*, 795 F.3d 1148. In that case, the plaintiffs alleged that APHIS' predator control activities caused injury and had to be stopped. In that case, the Ninth Circuit responded to the argument that Nevada would simply take over predator management, thus precluding redressability of plaintiff's injuries, by reasoning that the mere existence of multiple causes of an injury will not defeat redressability. *WildEarth Guardians*, 795 F.3d at 1157. However, the court in this case distinguished the state's record of predator management activities in *WildEarth Guardians* as merely *hypothetical*, rather than concrete, as in the current case. *Western Watersheds Project*, 2018 WL 495671, at \*13 (emphasis added). In contrast to that case, urged the court, independent wolf management activities by IDFG are not hypothetical but are ensured. *Id.* at \*14. The court found the case more analogous to an unpublished Ninth Circuit case, *Goat Ranchers*, in which the Ninth Circuit found that the plaintiffs lacked standing because the State of Oregon was likely to continue a cougar control program even if the defendant was enjoined from doing so, although the court admitted that the case lacked precedential value. *Id.*; *Goat Ranchers v. Williams*, 379 Fed. Appx. 662 (2010). The court identified the relevant existing precedent as the Supreme Court's decision in *Lujan*, which found that "plaintiffs cannot establish redressability if the relief they seek will not prevent a non-party from carrying on the same activity and it is likely that they will do so." *Western Watersheds Project*, 2018 WL 495671, at \*14; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 568-70 (1992). Accordingly, the court held that Plaintiffs lacked standing because the remedy they sought, enjoining Wildlife Services from killing wolves and

vacating the 2011 EA, would not redress their injury of fewer wolves in Idaho. *Western Watersheds Project*, 2018 WL 495671, at \*14.

*D. Conclusion*

In conclusion, the United States District Court for the District of Idaho found that although Plaintiffs successfully alleged an injury, the injury could not be redressed. Due to the multilevel nature of wolf management in Idaho, removal of a federal agency from wolf management would not effectively solve Plaintiff's problems because the state was already primed and willing to manage wolf populations itself. Because projects implicating NEPA commonly involve state agencies in addition to federal agencies, environmental plaintiffs in NEPA cases will have difficulty establishing redressability for standing purposes when both state and federal agencies are able to interchangeably conduct the allegedly injurious activities.

D. Ryan Cordell, Jr.