

# Environmental Impact Assessment Committee Newsletter

Vol. 4, No. 1

April 2009

## CHAIR'S MESSAGE

**Joan E. Drake**  
**Modrall Sperling**  
**Albuquerque, New Mexico**

Welcome to the first 2009 newsletter of the Environmental Impact Assessment Committee. The committee has undergone a few changes since the last newsletter issue. I succeeded Norman Carlin as chair of the committee following Norman's two years of exemplary service in that position. Many thanks to Norman for his service as chair and for agreeing to continue through 2008 as our *Year in Review* vice chair. Many thanks also are due to our new slate of committee vice chairs:

- *Newsletter Vice Chair:* Madeline Stone, Holland & Knight, San Francisco, madeline.stone@hklaw.com
- *Membership Vice Chair:* Shawna Bligh, The Session Law Firm, Kansas City, sbligh@session.com
- *Programs Vice Chair:* William Malley, Perkins Coie, Washington, D.C., WMalley@perkinscoie.com

We are looking for a Technology vice chair. If you are interested in helping us spruce up our Web site and make more effective use of technology, please let us know.

I would like to extend a special thank you and welcome to Madeline Stone, our newsletter vice chair.

Madeline has put together an excellent trio of articles for this issue and has plans for future special issues on U.S. Forest Service planning, climate change, and other evolving issues. We encourage all of our members to consider authoring a short newsletter piece on an issue of interest to our members. We would like to hear from you.

We include three interesting articles in this newsletter issue. Jim Farrell of Butler, Snow, O'Mara, Stevens & Cannada, provides part 2 of his review of *NRDC v. Winter*, also known as the Navy Sonar case, following the U.S. Supreme Court's decision which relied heavily on deference to military interests. Amy MacKenzie of Perkins Coie provides a review of the Ninth Circuit panel's decision, now vacated, regarding NEPA review of off-shore oil and gas exploration and development. These two decisions both address judicial deference in NEPA cases, a key litigation factor for agencies, project proponents, environmental groups, and the public. Finally, Bill Scott and Greg Gambill of Modrall Sperling review the recent Ninth Circuit decision in the Snowbowl case, which addressed burdens on Native Americans' exercise of religion under the Religious Freedom Restoration Act as well as NEPA analysis of cultural and historic properties involving tribal religious beliefs and practices. This is an evolving issue that NEPA practitioners will need to address for projects that may affect resources of concern to tribes.

We welcome input from our members. Please contact me at [jdrake@modrall.com](mailto:jdrake@modrall.com) if you have comments, questions, concerns, or just want to get acquainted.

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Committee Newsletter  
Vol. 4, No. 1, April 2009  
Madeline O. Stone, Editor**

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**NRDC V. WINTER PART TWO: COURT'S  
DEFERENCE ENDS THE CURRENT  
DEBATE BETWEEN PROPONENTS OF  
NATIONAL SECURITY AND ADVOCATES  
OF ENVIRONMENTAL PROTECTION**

**James R. Farrell  
Butler, Snow, O'Mara,  
Stevens & Cannada, PLLC**

*Editor's Note: Mr. Farrell is a graduate of the U.S. Naval Academy and former naval officer. This article is the second in a two-part series that has chronicled attempts by various environmental groups to enjoin Navy sonar exercises conducted off the coast of southern California. Picking up where Part One left off, Part Two discusses the Supreme Court's recent ruling on Nov. 12, 2008.*

**Introduction**

*"To be prepared for war is one of the most effectual means of preserving peace."* *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 370 (2008) (quoting George Washington, Annual Address to Congress, in 1 MESSAGES AND PAPERS OF THE PRESIDENTS 57 (J. Richardson comp., 1897)).

This quote, the United States Supreme Court's opening salvo in *NRDC v. Winter*, left little question about the likelihood that the Navy had successfully outmaneuvered its environmental opposition. At one point, the Court made a feeble attempt to placate environmental activists by assuring them "military interests do not always trump other considerations" (*id.* at 378); however, the deferential tone that resonated throughout the rest of the opinion likely drowned out any sincerity in the Court's gesture. As the Court noted on numerous occasions, it "give[s] great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." *Id.* at 377.

Despite the Navy's show of supremacy in this latest skirmish with the Natural Resources Defense Council (NRDC) and its allies, the Navy has not emerged from this litigation entirely unscathed. Plaintiffs successfully

imposed four of six mitigation measures now applicable to mid-frequency active (MFA) sonar exercises conducted in the southern California operating area (SOCAL)—only the two challenged restrictions brought before the Court are now lifted.

In similar but unrelated litigation regarding the Navy’s use of MFA sonar, the Navy entered into a settlement agreement on Dec. 27, 2008, with NRDC and several other environmental groups. *See Environmental Coalition Reaches Agreement with Navy on Mid-Frequency Sonar Lawsuit*, <http://www.nrdc.org/media/2008/081228.asp> (last visited Mar. 23, 2009); *see also Navy Settles Worldwide Mid-Frequency Active Sonar Lawsuit*, [http://www.navy.mil/search/display.asp?story\\_id=41605](http://www.navy.mil/search/display.asp?story_id=41605) (last visited Mar. 23, 2009). Among other things, the settlement agreement requires the Navy to pay \$14.75 million over the next three years for marine mammal research and \$1.1 million in attorney’s fees; however, it stops short of imposing additional mitigation measures such as the two restrictions the Navy successfully challenged in this case.

Both sides in this case can (and undoubtedly will) claim victory based upon the fractional successes they have shared over the past nineteen months. In the end, the intrigue of this case lies less in its outcome than in its capacity for offering us real insight into the minds of the Justices.

### **The Lower Courts’ Abuse of Discretion**

*“A preliminary injunction is an extraordinary remedy never awarded as of right.” Winter, 129 S. Ct. at 376.*

Throughout the opinion, the Court insisted that it had not, and had no reason to, “address the lower courts’ holding that plaintiffs [had] . . . established a likelihood of success on the merits.” *Id.* Both the district court and the Ninth Circuit placed tremendous emphasis on the strength of Plaintiffs’ National Environmental Policy Act (NEPA) claim, which essentially alleged the Navy violated NEPA by failing to prepare an Environmental Impact Statement (EIS) before conducting MFA sonar operations in the SOCAL, and both relied principally

upon this ground to impose and affirm, respectively, the injunction. *See Natural Res. Def. Council, Inc. v. Winter*, 508 F.3d 885, 886 (9th Cir. 2008) (“Plaintiffs have shown a strong likelihood of success on the merits of their claims under [NEPA].”) (alteration in original); *see also Natural Res. Def. Council v. Winter*, 527 F. Supp. 2d 1216, 1238 (C.D. Cal. 2008) (“conclud[ing] that the injunction [stood] firmly on NEPA grounds”). The Court, however, reiterated its four-element test for imposing a preliminary injunction, noting that Plaintiffs’ likelihood of success on the merits represented only one of those four elements, and “[fou]nd the injunctive relief granted . . . [was] an abuse of discretion, even if plaintiffs [we]re correct on the underlying merits.” *Winter*, 129 S. Ct. at 381 n. 5.

### ***The Test for Imposing a Preliminary Injunction***

After presenting a comprehensive overview of the case’s complex procedural history in the opening pages of the opinion, the Court devoted the remainder of its opinion to a sequential analysis of the four elements of its test for imposing a preliminary injunction. According to the test articulated by the Court,

#### **A plaintiff seeking a preliminary injunction must establish**

- [1] that he is likely to succeed on the merits,
  - [2] that he is likely to suffer irreparable harm in the absence of preliminary relief,
  - [3] that the balance of equities tips in his favor, and
  - [4] that an injunction is in the public interest.
- Id.* at 374.

#### **Element #1: Plaintiffs’ Likelihood of Success on the Merits**

*“[W]e do not address the underlying merits of plaintiffs’ claims.” Id.* at 381.

According to the Court, the district court and Ninth Circuit had focused almost exclusively on the strength of Plaintiffs’ NEPA claim. The Court quickly dismissed

both the substance and relevance of the lower courts' reasoning by narrowing its opinion to an abuse of discretion determination, the outcome of which was independent of the Navy's alleged wrongdoing.

For those who had hoped to see the Court clearly take a side in this case by openly addressing Plaintiffs' fundamental claim, the Court's resolution of the case—focusing, instead, on the enforceability of the remedy selected by the lower courts—likely disappointed. But that is not to say the Court completely deprived its audience of insight into the Justices' underlying sentiments about the merits of Plaintiffs' claim. As the Court's analysis of the remaining elements will demonstrate, the Court occasionally, albeit discreetly, challenged several of the lower courts' conclusions about the strength of Plaintiffs' NEPA claim.

## **Element #2: Plaintiffs' Likelihood of Suffering Irreparable Harm in the Absence of Preliminary Relief**

*"[T]his is not a case in which the defendant is conducting a new type of activity with completely unknown effects on the environment." Id. at 376.*

The Court agreed with the Navy that the lower courts articulated a standard for imposing a preliminary injunction that was more lenient than the actual standard required. The district court and Ninth Circuit had held that if Plaintiffs could prove a *strong* likelihood of success on the merits, they would not be required to prove a *likelihood* of irreparable harm in the absence of the injunction; rather, they would only need to prove a *possibility* of irreparable harm.

Despite the lower courts' initial articulation of a more lenient standard and the implication that this lesser standard formed the basis of the lower courts' decision to impose the preliminary injunction, the Court noted that the lower courts' subsequent reasoning suggested they may have applied the correct standard. In particular, the Court cited the lower courts' "conclusion that plaintiffs had established a 'near certainty' of irreparable harm," (*id.* (quoting *Natural Res. Def. Council, Inc. v. Winter*, 518 F.3d 658, at 696-97 (9th Cir. 2008))) a conclusion that would arguably satisfy the

requirement that Plaintiff proves its likelihood of suffering irreparable harm in the absence of preliminary relief.

Although the Court gave the district court and Ninth Circuit the benefit of the doubt as to the standard applied, the Court ultimately questioned the conclusion they had reached. For several reasons, the Court found unconvincing the lower courts' arguments in support of their finding of a "near certainty" of irreparable harm, thereby eroding one of the crucial grounds upon which the lower courts had issued the preliminary injunction.

First, the Court pointed out that the district court had never reevaluated its original finding of a "near certainty" of irreparable harm. The district court had reached its "near certainty" conclusion early in the litigation and prior to its imposing a preliminary injunction comprising six mitigation measures designed to reduce MFA sonar's perceived harm to marine mammals. Further, the Navy eventually accepted four of the district court's six mitigation measures, including the twelve-nautical mile coastal exclusion zone which, according to the district court, "would bar the use of MFA sonar in a significant portion of important marine mammal habitat." *Id.* (quoting *Natural Res. Def. Council, Inc. v. Winter*, 530 F. Supp. 2d 1110, 1119 (C.D. Cal. 2008)).

Alternatively, even if the Navy had not accepted four of the six mitigation measures, the Court highlighted facts that contradicted the lower courts' "near certainty" conclusion. First, the Court noted that the Navy has conducted MFA sonar operations in the SOCAL for forty years with "no documented case of sonar-related injury to marine mammals . . ." *Id.* at 375. In the Court's view, this fact called into question not only the relevance of an EIS, which the Court said was better suited to the review of federal activities with less predictable environmental impacts, but also Plaintiffs' justification for demanding one.

Finally, despite the Court's insistence that it had not considered the merits of Plaintiffs' claim, the Court appeared satisfied that the Navy had complied with NEPA's procedural mandate. The Court noted that

“the latest series of exercises were not approved until after the [Navy] took a ‘hard look at environmental consequences’ . . . as evidenced by the issuance of a detailed, 293-page EA,” (*id.* at 376 (citation omitted)) suggesting the Environmental Assessment (EA) provided a substantial and credible basis both for the Navy’s earlier Finding of No Significant Impact (FONSI) and the Court’s later rebuff of Plaintiffs’ assertion that failure to enjoin the Navy’s use of MFA sonar in the SOCAL exercises would create a “near certainty” of irreparable harm.

**(3) Element #3: Plaintiffs’ Proof that the Balance of Equities Tips in Their Favor; and  
(4) Element #4: Plaintiffs’ Proof That an Injunction is in the Public’s Interest**

*“Even if plaintiffs have shown irreparable injury from the Navy’s training exercises, any such injury is outweighed by the public interest and the Navy’s interest in effective, realistic training of its sailors.” Id.*

*“We accept [the Navy’s] assertions that the use of MFA sonar under realistic conditions during training exercises is of the utmost importance to the Navy and the Nation.” Id.* at 377.

Drawing upon language it crafted for another recently issued opinion, the Court began its discussion of elements three and four by emphasizing that “neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people.” *Id.* (quoting *Boumediene v. Bush*, 128 S. Ct. 2229, 2276-77 (2008)). Having underscored its ignorance of military matters before discussing them in more detail, the Court left no doubt that it intended to introduce, and then immediately defer to, the various arguments advanced by the Navy. Although the Court hinted early at the deferential theme that would eventually dominate the remainder of its opinion, it saved the greatest concentration of its deferential language for the most subjective portion of its analysis.

Like the district court and Ninth Circuit, the Court weighed the competing equities in conjunction with its

assessment of the public’s interest. On one hand, the Court weighed the Navy’s insistence “that realistic training [could not] be accomplished under the two challenged restrictions imposed by the District Court—the 2,200-yard shutdown zone and the requirement that the Navy power down its sonar systems during significant surface ducting conditions”; (*id.*) on the other hand, the Court weighed Plaintiffs’ “conten[tion] that the Navy’s use of MFA sonar [would] injure marine mammals or alter their behavioral patterns, impairing plaintiffs’ ability to study and observe the animals.” *Id.* at 377-78. The Court indicated that it accepted the sincerity of Plaintiffs’ arguments; however, it could not ignore what it considered to be a glaring inequity between Plaintiffs’ “most serious possible injury . . . harm to an unknown number of the marine mammals that they study and observe” (*id.* at 378), and the potentially life-threatening consequences to the Navy and the American public of “forcing the Navy to deploy an inadequately trained antisubmarine force.” *Id.* In the Court’s final analysis, “the proper determination of where the public interest l[ay] d[id] not strike [the Court] as a close question.” *Id.*

After announcing its own conclusion about the impropriety of the preliminary injunction in light of the competing equities and public interest, the Court then criticized the lower courts’ superficial analysis of these two elements. Because the district court concluded in one sentence and without any meaningful analysis “that the balance of hardships tip[ped] in favor of granting an injunction, as the harm to the environment, plaintiffs, and public interest outweigh[ed] the harm that Defendants would incur” (*id.*), the Court could do nothing more than note “the District Court addressed these considerations in only a cursory fashion.” *Id.* Even the Ninth Circuit chastised the District Court for its failure to “give serious consideration to the public interest factor.” *Id.*

The Court then attacked the Ninth Circuit’s analysis, which also “favored the plaintiffs, largely based on its view that the preliminary injunction would not in fact impose a significant burden on the Navy’s ability to conduct its training exercises and certify its strike groups.” *Id.* The Ninth Circuit regarded as speculative the Navy’s concerns that the two challenged mitigation


measures would jeopardize the quality of the Navy’s sonar training and, consequently, the Navy’s ability to defend against the growing threat posed by our adversaries’ increasing numbers of diesel-electric submarines. According to the Ninth Circuit, only after the Navy had operated with the challenged restrictions in place and proven the restrictions had unquestionably degraded the effectiveness of the training exercises could the Navy convince the Ninth Circuit the challenged mitigation measures were overly burdensome.

After rejecting the Ninth Circuit’s analysis, the Court conducted its own assessment of the likely impact of the challenged mitigation measures. First, the Ninth Circuit had concluded “the 2,200-yard shutdown zone would not be overly burdensome because sightings of marine mammals during training exercises are relatively rare.” *Id.* at 379. In response, the Court cited statements of several senior Navy officers who insisted “each additional shutdown [could] result in the loss of several days’ worth of training” (*id.*) and “would cause operational commanders to ‘lose awareness of the tactical situation through the constant stopping and starting of MFA [sonar].”” *Id.* (alteration in original). Moreover, the Court noted that while it is true the Navy has previously conducted MFA sonar exercises subject to shutdown zones, those zones have never exceeded 200 yards. *Id.* (noting that an “[i]ncreas[e] [in] the radius of the shutdown zone from 200 to 2,200 yards would accordingly expand the surface area of the shutdown zone by a factor of over 100 (from 125,664 square yards to 15,205,308 square yards)”).

Finally, the Court held that requiring the Navy to power down its sonar by six decibels during surface ducting conditions would significantly affect the Navy’s sonar training exercises. Whereas the Ninth Circuit cited the infrequency of surface ducting conditions for the proposition that the power down requirement was, therefore, not overly burdensome, the Court responded by emphasizing the importance of lifting the power down requirement so that it would not jeopardize invaluable training opportunities during the extremely rare and, therefore, tactically significant, surface ducting conditions.

## Conclusion

In the end, one word determined the outcome of the dramatic case that pitted environmental activists against White House-backed proponents of the U.S. Navy: deference. Although the Court limited the scope of its holding by focusing primarily upon the preliminary injunction, the overriding theme of deference that defined the Court’s opinion and, perhaps, reflected a fundamental predisposition, suggests the Court may have reached the same conclusion even if it had openly considered the merits of Plaintiffs’ underlying claims.



Environmental Impact Assessment  
Committee Newsletter

**LIKE TO WRITE?**

The Environmental Impact Assessment Committee welcomes the participation of members who are interested in preparing this newsletter. If you would like to lend a hand by writing, editing, identifying authors, or identifying issues, please contact the editor, Madeline Stone, at [madeline.stone@hkllaw.com](mailto:madeline.stone@hkllaw.com).

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**ALASKA WILDERNESS LEAGUE V.  
KEMPTHORNE: THE NINTH CIRCUIT  
STRUGGLES TO DETERMINE WHETHER  
THE NEPA ANALYSIS FOR OFFSHORE  
DRILLING PLANS IN ALASKA  
MEETS THE MCNAIR TEST**

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**Amy J. MacKenzie  
Perkins Coie, LLP  
Anchorage, Alaska**

President Barack Obama sees Outer Continental Shelf (OCS) oil and gas drilling as part of a comprehensive energy policy. His administration is currently reviewing a five-year drilling plan that includes oil and gas lease sales in Cook Inlet, the Beaufort and Chukchi Seas, and in the North Aleutian Basin north of the Alaska Peninsula on the edge of Bristol Bay. Secretary of the Interior Ken Salazar recently requested that the Mineral Management Service (MMS), an agency within the Department of the Interior, prepare a report summarizing all offshore resources in the United States, both oil and gas, as well as renewable resources such as wind and wave energy.

The Ninth Circuit is struggling to define the level of National Environmental Policy Act (NEPA) analysis required in the context of exploring for and developing domestic resources, particularly those located on the OCS. In a recent case decided late last year, a three-judge panel of the Ninth Circuit sent MMS back to the drawing board to analyze exploration plans for offshore drilling in Alaska. *Alaska Wilderness League v. Kempthorne*, 548 F.3d 815 (9th Cir. 2008) (hereafter, *Kempthorne*). Following a request for *en banc* review, however, the Ninth Circuit inexplicably vacated the panel's opinion. In its March 6, 2009, order, the court promised a new opinion at an unspecified date. The order gave no indication whatsoever of what the ultimate outcome of the court's review will be. This article provides an overview of the vacated opinion and summarizes its potential impacts on future development efforts in Alaska and elsewhere if the ruling is allowed to stand.

## **Background**

In April 2002, the MMS issued a five-year plan that scheduled oil and gas lease sales for the OCS of the Gulf of Mexico and Alaska. In February 2003, MMS prepared a detailed, 1,500-page Environmental Impact Statement (multi-sale EIS) under NEPA to evaluate the overall environmental impacts of the activities associated with these lease sales. The multi-sale EIS contemplated that further environmental analysis, using site-specific information, would occur prior to approval of specific exploration or development plans.

The five-year plan included three separate lease sales in the Beaufort Sea, a body of water that is part of the Arctic Ocean bordering the North Slope of Alaska. In July 2004, Shell Offshore Inc. (Shell) purchased one of these three leases, which became the center of the controversy addressed in the case at hand.

The Outer Continental Shelf Lands Act (OCSLA) requires that a lessee obtain MMS approval of an exploration plan (EP) before beginning exploratory drilling on the OCS. 30 C.F.R. § 250.201. The EP must contain a project-specific environmental impact analysis assessing the potential effects of the proposed exploration activities. 30 C.F.R. § 250.227. Once MMS deems the plan complete, the agency conducts its environmental review pursuant to NEPA. 30 C.F.R. § 250.232(c).

In 2006, Shell submitted the first version of its EP to drill up to twelve exploratory wells in the Beaufort Sea over a period of three years. The area where the drilling is proposed stretches from the Colville River Delta eastward to the Canadian border. In the first year, Shell proposes to drill four wells in Camden Bay. In the following two years, Shell proposes to drill an undetermined number of wells at locations depending on the initial drilling results. Shell plans to use two icebreaking ships, two drilling vessels, various other supply boats, and up to six aircraft. All exploration would occur between June and mid-November. After Shell supplied some additional information requested by MMS, the agency deemed the plan complete and on Jan. 17, 2007, began the environmental review and approval process.

During the MMS review of the EP, some agency experts expressed concern that Shell's exploration activities might have significant impacts on bowhead whales and Inupiat subsistence harvest of the whales. Because bowhead whales, a species listed as endangered under the Endangered Species Act, are sensitive to noise, concerns were raised regarding possible disruption of migration and separation of females from their calves as a result of underwater noise caused by Shell's icebreaking and drilling work. In addition, subsistence harvest could foreseeably be disrupted if the whales were displaced by noise from traditional Inupiat whaling grounds.

MMS, in an 87-page Environmental Assessment (EA) and a Finding of No Significant Impact (FONSI) issued on Feb. 15, 2007, addressed those issues. The EA "tiers" to the prior multi-sale EIS. Agencies are "encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for discussion at each level of environmental review." 40 C.F.R. § 1502.20. When an environmental analysis under NEPA is tiered, the subsequent document need only summarize the issues discussed in the broader statement, concentrating on the issues specific to the subsequent action. In this case, the EA issued by MMS states as follows:

The level and types of activities proposed in the Shell EP are within the range of the activities described and evaluated in the Beaufort Sea multiple-sale EIS . . . and updated in [the EAs] for [the lease sales].

Based on the agency's finding that Shell's proposed activities had been adequately analyzed under the EIS and subsequent EA, in combination with its conclusion that Shell's proposed exploration activities would not "significantly affect the quality of the human environment," MMS did not prepare an EIS specific to Shell's exploration plan for the lease. Several petitioners, including the Alaska Wilderness League, the National Resources Defense Council, and the Pacific Environment, sought review of this decision in the Ninth Circuit Court of Appeals.

## Analysis

NEPA requires that, "to the fullest extent possible," all federal agencies prepare an EIS when considering proposed activities "significantly affecting the quality of the human environment." 42 U.S.C. § 4332. However, an agency may prepare a less exhaustive EA to determine whether an EIS is necessary. 40 C.F.R. § 1508.9. An EA is a "concise public document" that "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS] or [FONSI]." *Id.* In other words, if an agency decides not to prepare an EIS and instead issues a FONSI, the EA must demonstrate that the agency took the requisite "hard look" at the proposal under NEPA and reasonably concluded that potential environmental impacts will not be "significant." As discussed above, agencies are encouraged to "tier" their NEPA documents in order to avoid redundant discussion and analysis. 40 C.F.R. § 1502.20.

The Ninth Circuit panel reviewing the MMS decision found that the agency failed to provide a "convincing statement of reasons explaining why Shell's exploratory drilling plans at the [specific sites in question] would have an insignificant impact on bowhead whales and Inupiat subsistence activities." The court rejected the argument that the EA was adequate because the range and type of activities to be conducted during the exploration were within the range and type of activities analyzed under the multi-sale EIS. *Kemphorne*, 548 F.3d 815, 825. In reaching this conclusion, the majority of the three-judge panel relied heavily upon the fact that the earlier multi-sale EIS, upon which the EA relies, analyzed noise-related consequences of a drilling operation involving two drillships with one icebreaker, versus the noise of two drillships with two icebreakers, as proposed in Shell's EP. *Id.* at 826. In addition, the majority was troubled by the fact that the studies were based on simulations of noise effects, rather than noise caused by the actual work in an uncontrolled setting. *Id.*

In his dissent, Circuit Judge Carlos T. Bea takes the majority to task for making such "fine-grained judgments" about the weight of specific studies on which MMS relied in its decision making. *Id.* at 842.

Judge Bea reminds the majority of a recent *en banc* decision of the Ninth Circuit, *The Lands Council v. McNair*, 537 F.3d 981, 994 (9th Cir. 2008) (hereafter “*McNair*”), which expressly rejects this approach. In that case, the Ninth Circuit held that the role of judges, in reviewing agency action as nonscientists, is merely to ensure that an agency analyzes the issues based on “studies that the agency, in its expertise, deems reliable.” Courts are not to “assess . . . the quality and detail of the studies on which the agency relies.” *McNair*, 537 F.3d at 993. The role of the court is to ensure that the agency has not: (1) “relied on factors which Congress has not intended it to consider,” (2) “entirely failed to consider an important aspect of the problem,” or (3) “offered an explanation for its decision that runs counter to the evidence before the agency or an explanation that is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Id.* at 994.

In the case at hand, MMS relied on the multi-sale EIS that had previously analyzed underwater noise caused by two drillships and one icebreaker. *Kemphorne*, 548 F.3d at 843. The EIS concluded that the effect of such noise on whales would likely be “short-term” and not disruptive of migration patterns. MMS also relied on the National Marine Fisheries Service’s conclusion, pursuant to its Endangered Species Act review, that the exploratory drilling and associated activities would not jeopardize the continued existence of bowhead whales. Finally, MMS based its conclusions in the EA on a noise analysis specific to the particular drilling vessels and icebreakers Shell planned to use. To further ensure that any impacts from underwater noise would be insignificant, MMS required that Shell monitor the effects of its exploratory program on marine life and make changes to its practices to address any disturbance. *Id.*

The majority rejected the EA as inadequate based on its own independent assessment of the above studies. The majority appeared to “cherry pick” phrases from the EA and underlying documents mentioning the possibility of biological impacts, despite the fact that, after assessing and weighing the chance of such harm, each document concluded no significant impairment of the whale populations would occur. *Id.* at 826-27. As

noted by the dissent, following the *en banc* decision in *McNair*, the ultimate decision regarding significance of environmental impacts is the exclusive purview of the agency, not the courts, as such evaluations fall within the core competency of the agency’s expertise. *Id.* at 843.

## Conclusions

The *Kemphorne* panel’s decision raised questions regarding the appropriate level of impact analysis required for resource development projects, as well as the appropriate role of the court when reviewing an agency’s conclusions regarding environmental significance. The court set a very high standard for compliance with NEPA by demanding a detailed analysis of effects. In addition, the panel’s decision essentially ignored the fact that it was reviewing a “tiered” NEPA document. Its refusal to acknowledge the extensive analysis conducted previously under the multi-sale EIS seemingly undermined the purpose behind tiering, namely to prevent redundancy and undue delay. Taken together, these two outcomes set the NEPA bar at a level that may be difficult to meet in many cases, foreseeably stifling future natural resource development efforts.

In addition, the panel’s lack of deference to the agency’s judgments regarding the appropriate methodologies and level of detail required under NEPA appears to be inconsistent with the Ninth Circuit’s recent and strongly worded *en banc* decision in *McNair*. In that case, the Ninth Circuit rejected the tendency of some courts to make “fine-grained judgments” about the weight of specific studies relied upon by federal agencies during their NEPA review. Such an inconsistency within Ninth Circuit precedent could lead to unpredictable results, causing uncertainty for courts, agencies, the public, and project proponents. Again, uncertainty and delay could very well have a chilling effect on future, multi-stage development projects.

However, the Ninth Circuit is taking a second look at Shell’s exploration plans and their review under NEPA. Although impossible to predict the ultimate outcome, the Ninth Circuit may have vacated the original opinion

based on concerns regarding consistency with *McNair*. It is also possible that the new administration's balanced approach to the nation's energy policy may influence the court's NEPA analysis. Check back for a future article updating the status of this important case.

## NINTH CIRCUIT DECIDES "SNOWBOWL" CASE, DRAWING ASCERTAINABLE LINES UNDER RELIGIOUS FREEDOM RESTORATION ACT AND NEPA

William C. Scott  
Greg L. Gambill

*Modrall, Sperling, Roehl, Harris & Sisk, P.A.*

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On Aug. 8, 2008, a divided U.S. Court of Appeals for the Ninth Circuit issued its *en banc* decision in *Navajo Nation v. United States Forest Service*, 535 F.3d 1058 (9th Cir. 2008), rejecting the claims of several Indian tribes that the use of reclaimed water for snowmaking purposes on the San Francisco Peaks north of Flagstaff, Arizona, would spiritually contaminate those mountains and devalue the Tribes' religious experience and religious uses of the peaks in violation of the Religious Freedom Restoration Act (RFRA). The opinion is significant because it draws an objectively identifiable line between activities that burden Native Americans' exercise of religion and those that do not. The opinion also adopts a three-member panel's remarks concerning NEPA analysis of cultural and historic properties involving tribal religious beliefs and practices.

### Physical Effects Versus Impacts to Subjective Religious Experiences under RFRA

The nine-member majority opinion rejects the Tribal Plaintiffs' claims of interference with religious practice. 535 F.3d at 1063. As the opinion explained, the Tribal Plaintiffs "contend that the use of recycled waste water to make artificial snow for skiing on the Arizona Snowbowl, a ski area that covers approximately one percent of the San Francisco Peaks, will spiritually contaminate the entire mountain and devalue their religious exercises." *Id.* The district court had determined that the Plaintiffs' beliefs were sincere and the Ninth Circuit found no reason to challenge that finding. *Id.*

The district court also found, however, that there are no plants, springs, natural resources, shrines with religious significance, or religious ceremonies

that would be physically affected by the use of such artificial snow. No plants would be destroyed or stunted; no springs polluted; no places of worship made inaccessible, or liturgy modified. The Plaintiffs continue to have virtually unlimited access to the mountain, including the ski area, for religious and cultural purposes. On the mountain, they continue to pray, conduct their religious ceremonies, and collect plants for religious use.

*Id.* In light of those findings, the Ninth Circuit reasoned that the “sole effect of the artificial snow is on the Plaintiffs’ subjective spiritual experience. *Id.* That is, the presence of the artificial snow on the Peaks is offensive to the Plaintiffs’ feelings about their religion and will decrease the spiritual fulfillment Plaintiffs get from practicing their religion on the mountain.” *Id.* The majority opinion found that was not a sufficient basis to support the Tribal plaintiffs’ claims under RFRA. *Id.* at 1063-64.

The Ninth Circuit explained that to establish a *prima facie* claim under RFRA, “a plaintiff must present evidence sufficient to allow a trier of fact rationally to find the existence of two elements. First, the activities the plaintiff claims are burdened by the government action must be an ‘exercise of religion’ . . . . Second, the government action must ‘substantially burden’ the plaintiff’s exercise of religion . . . if the plaintiff cannot prove either element, his RFRA claim fails.” *Id.* at 1068. The defendants did not contest the district court’s holding that the plaintiffs’ religious activities on the Peaks constitute an exercise of religion within the meaning of RFRA. *Id.* “The crux of this case, then, is whether the use of recycled wastewater on the Snowbowl imposes a ‘substantial burden’ on the exercise of the Plaintiffs’ religion.” *Id.* The Ninth Circuit concluded that it does not. *Id.* at 1070.

The use of recycled wastewater on a ski area that covers 1% of the Peaks does not force the Plaintiffs to choose between following the tenets of their religion and receiving a governmental benefit. . . . The use of recycled wastewater to make artificial snow also does not coerce the Plaintiffs to act contrary to their religion under the threat of civil or criminal sanctions. . . . The Plaintiffs are not fined or penalized in any way for

practicing their religion on the Peaks or on the Snowbowl. Quite the contrary: the Forest Service has guaranteed that religious practitioners would still have access to the Snowbowl and the rest of the Peaks for religious purposes. . . .

The only effect of the proposed upgrades is on the Plaintiffs’ subjective, emotional religious experience. That is, the presence of recycled wastewater on the Peaks is offensive to the Plaintiffs’ religious sensibilities. To Plaintiffs, it will spiritually desecrate a sacred mountain and will decrease the spiritual fulfillment they get from practicing their religion on the mountain. Nevertheless, under Supreme Court precedent, the diminishment of spiritual fulfillment—serious though it may be—is not a “substantial burden” on the free exercise of religion.

*Id.*

As the majority explained, a government action that “decreases the spirituality, the fervor, or the satisfaction with which a believer practices his religion is not what Congress has labeled a ‘substantial burden’—a term of art chosen by Congress to be defined by reference to Supreme Court precedent—on the free exercise of religion.” *Id.* at 1063. Where there is no showing the government has “coerced the Plaintiffs to act contrary to their religious beliefs under the threat of sanctions, or conditioned a governmental benefit upon conduct that would violate the Plaintiffs’ religious beliefs, there is no ‘substantial burden’ on the exercise of their religion. *Id.*

Were it otherwise, any action the federal government were to take, including action on its own land, would be subject to the personalized oversight of millions of citizens. Each citizen would hold an individual veto to prohibit the government action simply because it offends his religious beliefs, sensibilities, or tastes, or fails to satisfy his religious desires. Further, giving one religious sect a veto over the use of public park land would deprive others of the right to use what is, by definition, land that belongs to everyone.

“[W]e are a cosmopolitan nation made up of people of almost every conceivable religious

preference.” *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). Our nation recognizes and protects the expression of a great range of religious beliefs. Nevertheless, respecting religious credos is one thing; requiring the government to change its conduct to avoid any perceived slight to them is quite another. No matter how much we might wish the government to conform its conduct to our religious preferences, act in ways that do not offend our religious sensibilities, and take no action that decreases our spiritual fulfillment, no government—let alone a government that presides over a nation with as many religions as the United States of America—could function were it required to do so.

*Id.* at 1063-64.

A dissent by three of the panel’s members argued the majority’s holding that the exercise of religion is not substantially burdened by “spraying 1.5 million gallons per day of treated sewage effluent on the most sacred mountain of southwestern Indian tribes” was a product of “misstated” evidence in the record below, the law under RFRA, and a misunderstanding of the “very nature of religion.” *Id.* at 1081. The dissent stated that the proposed expansion of the Arizona Snowbowl violated RFRA because it imposed a substantial burden on the Indians’ exercise of religion and was not justified by a compelling government interest. *Id.* at 1097.

The majority’s distinction between activities that physically affect environmental elements related to religious practices and those that may be perceived as having a detrimental effect on practitioners’ subjective religious experience doubtless will be analyzed by courts and scholars. However, it provides third parties seeking to predict the effect of the Religious Freedom Restoration Act objectively ascertainable indicia to guide their plans and actions.

## NEPA Claims

The Plaintiffs complained of five causes under NEPA, four of which were summarily dismissed by the district court and upheld by a three-member panel, *see*

*Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1029 (9th Cir. 2007). The *en banc* Snowbowl panel affirmed, without further discussion, the panel’s dismissal of the four NEPA claims by adopting the parts of the panel’s opinion that affirmed the district court’s grant of summary judgment to defendants on those claims. 535 F.3d at 1079.

The four dismissed NEPA claims alleged: (1) that the final environmental impact statement (FEIS) failed to consider a reasonable range of alternatives to the use of recycled wastewater, (2) that the FEIS failed to discuss and consider the scientific views of an expert, (3) that the FEIS failed adequately to consider the impact of diverting the recycled wastewater from Flagstaff’s regional aquifer, and (4) that the FEIS failed adequately to consider the social and cultural impacts on the Hopi people. *Id.* The first NEPA claim was dismissed because the balance of the administrative record, albeit brief, sufficiently demonstrated that the Forest Service had not foreclosed all consideration of alternatives to the use of recycled wastewater. 479 F.3d at 1056. The second NEPA claim was dismissed because the scientific views of the expert at issue did not represent an undisclosed opposing viewpoint to which the Forest Service failed to respond openly in the FEIS. *Id.* at 1057. Rather, the district court found the expert’s views were merely variations of the same allegation, namely, that recycled wastewater, which may contain unregulated contaminants such as prescription drugs and chemicals from personal care products in amounts not ordinarily found in drinking water, was disruptive to endocrine function. *Id.* The third NEPA claim was dismissed because the analysis in the FEIS was a reasonably thorough discussion of the issue and included a quantitative analysis of the net reduction in groundwater recharge to the regional aquifer, despite the “odd and backhanded way” in which it was presented. *Id.* at 1058.

In the fourth NEPA claim that was dismissed in the proceeding below, the Hopi Tribe argued that the FEIS analysis of the social and cultural impacts of the proposed action on the Tribe was inadequate. *Id.* at 1058-59. The three-member panel noted that the FEIS acknowledged that “it is difficult to be precise in the analysis of the impact of the proposed undertaking

on the cultural and religious systems on the Peaks, as much of the information stems from oral histories and a deep, underlying belief system of the indigenous peoples involved.” *Id.* at 1059. Despite the difficulty conducting such an analysis, the court approved of the efforts of the Forest Service to comply with NEPA by discussing the effects of the proposed action on the human environment, which included “drawing from existing literature and extensive consultation with the affected tribes,” and “describ[ing] at length the religious beliefs and practices of the Hopi and the Navajo and the ‘irretrievable impact’ the proposal would likely have on those beliefs and practices.” *Id.* The panel opinion suggests that, in situations where the potential for an impact on cultural properties and tribal religious practices exists, a reasonable attempt by an agency that is preparing a NEPA analysis to thoroughly describe and assess the significance of cultural properties and religious practices from the perspectives of the users of the property and the practitioners of the religion will survive an administrative legal challenge despite (or, perhaps, because of) the fact that assessing the impact on cultural properties and tribal religious practices is universally difficult to measure.

The fifth NEPA claim, which was considered by the *en banc* panel, raised the issue of whether the FEIS failed adequately to assess the risks posed by human ingestion of artificial snow. 535 F.3d at 1079. The panel below held that Plaintiffs’ complaint satisfied notice pleading requirements and that Plaintiffs’ comments and appeals were sufficient to put the Forest Service on notice of the claim and to exhaust the Plaintiffs’ administrative remedies. 479 F.3d at 1048. However, the *en banc* panel held that, because the Plaintiffs failed to include the claim in their complaint (the issue was first raised on their motion for summary judgment), and also failed to appeal the district court’s denial of their motion to amend the complaint to add the claim, the Plaintiffs waived the claim on appeal. 535 F.3d at 1079-80.

Plaintiffs filed a petition for *certiorari* on Jan. 5, 2009. The case number is 08-846. The question presented is “[w]hether a governmental action cannot constitute a ‘substantial burden’ under RFRA unless it

forces individuals to choose between following the tenets of their religion and receiving a governmental benefit or coerces them by threatening civil or criminal sanctions to act contrary to their religious beliefs.” The NEPA issues were not appealed.

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