

NINTH CIRCUIT SURVEY

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NINTH CIRCUIT TAKES A “HARD LOOK” AT NEPA AND THE ESA

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I. Introduction	458
II. ESA Decisions.....	Error! Bookmark not defined.
A. Alsea Valley Alliance v. Department of Commerce	Error! Bookmark not defined.
B. Cold Mountain v. Garber.....	Error! Bookmark not defined.
C. Gifford Pinchot Task Force v. United States Fish & Wildlife Service	Error! Bookmark not defined.
D. Ocean Conservancy, Inc. et al. v. National Marine Fisheries Service	Error! Bookmark not defined.
E. Association of California Water Agencies v. Evans.	Error! Bookmark not defined.
E. Analysis of ESA Decisions.....	Error! Bookmark not defined.
III. NEPA Decisions	Error! Bookmark not defined.
A. Ocean Advocates v. U.S. Army Corps of Engineers	Error! Bookmark not defined.
B. Anderson v. Evans.....	Error! Bookmark not defined.

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C. Westlands Water District v. U.S. Department of the Interior	Error! Bookmark not defined.
D. The Lands Council v. Powell	Error! Bookmark not defined.
E. High Sierra Hikers Association v. National Forest Recreation Association.....	Error! Bookmark not defined.
F. Ground Zero v. United States Department of Navy..	Error! Bookmark not defined.
G. Analysis of NEPA Decisions	Error! Bookmark not defined.
Conclusion	Error! Bookmark not defined.

I. INTRODUCTION

The Ninth Circuit issued well over two dozen published opinions in the environmental law area in 2004.¹ This Article addresses eleven opinions that involve the Endangered Species Act (ESA) and the National Environmental Policy Act (NEPA).² The cases under those topics are as follows:

ESA: (1) *Alesea Valley Alliance v. Department of Commerce*,³ (2) *Cold Mountain v. Garber*,⁴ (3) *Gifford Pinchot Task Force v. United States Fish & Wildlife Service*,⁵ (4) *Ocean Conservancy, Inc. et al. v. National Marine Fisheries Service*,⁶ (5) *Ass'n of Calif. Water Agencies v. Evans*.⁷ Under NEPA: (1) *Ocean Advocates v. U.S. Army Corps of Engineers*,⁸ (2) *Anderson v. Evans*,⁹ (3) *Westlands Water District v. U.S. Dept. of the Interior*,¹⁰ (4) *The Lands Council v.*

1. In addition to the Endangered Species Act (ESA) and the National Environmental Policy Act (NEPA), the Ninth Circuit's other environmental opinions issued in 2004 pertain to, *inter alia*, the Clean Water Act, the Clean Air Act, the Comprehensive Environmental Response, the Compensation and Liability Act, and the Resource Conservation Recovery Act.

2. Some of the decisions covered in this Article also contain holdings that bear on the Marine Mammal Protection Act (MMPA), the National Forest Management Act (NFMA), and the Wilderness Act, which are briefly discussed herein.

3. 358 F.3d 1181 (9th Cir. 2004) (dismissing appeals challenging district court remand order regarding listing of coho salmon for lack of jurisdiction).

4. 375 F.3d 884 (9th Cir. 2004) (holding that a bison capture facility permit in Montana did not violate ESA or NEPA).

5. 378 F.3d 1059 (9th Cir. 2004) (holding a critical habitat analysis flawed based on incorrect definition of "adverse modification").

6. 382 F.3d 1159 (9th Cir. 2004) (denying costs to defendants after appeal dismissed as moot, where the plaintiffs were actually the prevailing parties under the ESA).

7. 386 F.3d 879 (9th Cir. 2004) (upholding awarding fees and costs under ESA despite dismissal of appeal as moot).

8. 361 F.3d 1108 (9th Cir. 2004) (requiring EIS to address impact of tanker traffic increases re permit to extend oil refinery dock).

9. 371 F.3d 475 (9th Cir. 2004) (holding that NEPA requires EIS before approving whaling quota for tribe).

10. 376 F.3d 853 (9th Cir. 2004) (extending deference to agency despite NEPA irregu-

Powell;¹¹ (5) *High Sierra Hikers Ass'n v. National Forest Recreation Ass'n*;¹² (6) *Ground Zero v. United States Department of Navy*.¹³

larities).

11. 379 F.3d 738 (9th Cir. 2004) (holding that timber harvesting project as part of watershed restoration violated NEPA and NFMA because Forest Service was too vague regarding past timber harvests and used outdated and faulty data regarding health of habitat).

12. 381 F.3d 886 (9th Cir. 2004) (holding that EIS must assess impacts of commercial packstock permits; Wilderness Act claims remanded).

13. 383 F.3d 1082 (9th Cir. 2004) (holding that no EIS is required for accidental missile explosion threat).