
Ninth Circuit Court of Appeals Courthouse, San Francisco, CA (credit: Ninth Circuit Court of Appeals)

I've shared in previous posts my view that the U.S. Court of Appeals for the Ninth Circuit is–after the U.S. Supreme Court–the most influential court in the nation when it comes to environmental and natural resources law. That's true for two related reasons: first, the sprawling Ninth Circuit encompasses nine different states (including California) and several territories in the Western United States that together generate considerable environmental litigation. Second, the Ninth Circuit regularly produces more environmental law decisions that any of the other 12 U.S. Circuit Courts of Appeals.

This trend continued in 2022, with the Ninth Circuit issuing over 50 published environmental decisions. As we bid farewell to 2022, here for your consideration is my list of the 10 most important of those decisions, listed in chronological order. The cases profiled below involve issues that run the gamut from climate change to environmental justice, water rights, offshore oil drilling, environmental federalism, the National Environmental Policy Act, toxics regulation and enforcement, animal welfare law and the Endangered Species Act.

Navajo Nation v. U.S. Dept. of the Interior (2/17/2022)–In this high profile water law/environmental justice case, the Ninth Circuit ruled that the Navajo Nation could proceed with its "breach of trust" lawsuit against the Department of the Interior to challenge DOI's alleged failure to consider the Nation's as-yet-undetermined federal reserved water rights to the Colorado River Basin. The Court of Appeals rejected arguments by DOI and the states of Arizona, Colorado and Nevada that the Navajo Nation's reserved water rights claim lacked any express basis in federal statute or treaty. (At a time when water from the Colorado River is at record low levels due to drought and climate

change, the Nation's claim of reserved and previously-unrecognized water rights complicates considerably the alarming water shortages the seven Colorado River Basin states, a host of Native American tribes and two nations are currently confronting.) But this litigation is far from over: last month the U.S. Supreme Court granted review in the case, which the justices should hear and decide by the end of June 2023.

Friends of Animals v. U.S. Fish and Wildlife Service (3/4/2022)–In this Endangered Species Act case, the Ninth Circuit ruled that the USFWS's experimental "barred owl removal project," which may incidentally "take" barred owls in order to protect listed spotted owl habitat, produced a "net conservation benefit" for spotted owls and is therefore permitted under the ESA. The court also ruled that the experimental program did not require preparation of a new environmental impact statement under the National Environmental Policy Act.

Friends of Alaska Nat'l Wildlife Refuges v. Haaland (3/16/2022)–Perhaps the most widely-publicized Ninth Circuit environmental decision this year involved a conflict between wilderness preservation groups and a Native Alaskan Village seeking construction of a new road to promote its residents' claimed health, safety and economic needs. A divided three-judge panel upheld Trump-era federal approval of a land exchange designed to facilitate construction of a road through Congressionally-designated wilderness within Alaska's Izembek National Wildlife Refuge. (The case gain notoriety in part because former President Jimmy Carter filed a friend-of-the-court brief in support of the unsuccessful coalition of environmental group plaintiffs.) But–like the *Navajo Nation* case discussed above–this litigation is not concluded: last month, the Ninth Circuit granted *en banc* review of this decision, meaning it will be reconsidered by an 11-judge panel of the court.

California Chamber of Commerce v. Council for Education and Research on Toxics (3/17/2022)–This Proposition 65 case from California involves the long-running legal and scientific controversy about whether acrylamide–a naturally-occurring chemical found in some foods and coffee–causes cancer. A divided Ninth Circuit panel ruled that given the robust disagreement among scientific experts over that question, the California Chamber of Commerce was likely to succeed on the merits of its claim that Proposition 65-mandated warnings on food products containing acrylamide violate the First Amendment of the U.S. Constitution. Notably, the majority went on to uphold an injunction prohibiting California's Attorney General and those in privity from filing lawsuits to require Proposition 65 notices on food and beverage products containing acrylamide. The decision found that the injunction–the first ever issued against California's Attorney General, the principal public enforcer of Proposition 65–did not constitute an impermissible prior restraint under the First Amendment.

350 Montana v. Haaland (4/4/2022)–In this important National Environmental Policy Act/climate change decision, the Ninth Circuit ruled that the U.S. Department of the Interior violated NEPA by failing to provide a convincing statement as to how expected greenhouse gas emissions from a proposed coal mine expansion on federal lands–involving 190 million tons of GHGs, *0.44% of total GHGs emitted globally*–was insignificant under NEPA. The court went on to find that DOI is required to use the social cost of carbon to quantify the project's projected harm to the environment, and remanded the case to the district court to determine whether an environmental impact statement is required under NEPA for the mine expansion project proposal.

County of San Mateo v. Chevron Corp. (4/19/2022)/***City & County of Honolulu v. Sunoco*** (7/7/2022)–These related decisions represent the latest chapter in the long-running effort by state and local governments to pursue state law-based tort claims against fossil fuel companies, seeking damages for the costs they have incurred in responding to the harm they and their constituents have allegedly suffered as a result of climate change. The *San Mateo* case was the first such lawsuit filed in what has become a national flood of related climate change litigation. While the California local government plaintiffs had filed their lawsuit in state court, the industry defendants attempted to remove the case to federal court, hoping for a more favorable judicial reception there. The Ninth Circuit, however, concluded that the defendants' removal of the case to federal court was improper, and remanded it back to California state court for resolution on the case's merits. Three months later, the Ninth Circuit reached the same result and remanded the related *Honolulu* climate change lawsuit back to Hawaii state court.

Natural Resources Defense Council v. U.S. Environmental Protection Agency (4/20/2022)–In another case involving Trump-era environmental regulatory decisions, the Ninth Circuit invalidated USEPA's denial of NRDC's petition to cancel EPA's registration of glyphosate–a pesticide registered under FIFRA in the U.S. for use in household pet products such as flea collars. The Court of Appeals concluded that EPA's decision to deny the petition was not supported by substantial evidence; that EPA failed to provide a reasonable explanation for its decision; and that the Agency has made several arbitrary calculations in reaching its conclusions.

Assn. des Eleveurs de Canards v. Bonta (5/6/2022)–This animal welfare case involved an industry challenge to a California statute banning the sale in California of poultry products–primarily foie gras–resulting from the force-feeding of birds for purposes of enlarging their livers beyond normal size. The Ninth Circuit upheld the statute, rejecting the poultry industry's constitutional arguments that the California law was preempted by the Federal Poultry Inspection Act and violated Dormant Commerce Clause principles. (This

decision is one of many recent rulings by the Ninth Circuit upholding a variety of California animal welfare laws; but that trend that may be imperiled by a pending U.S. Supreme Court case in which similar constitutional arguments are being advanced by industry plaintiffs to challenge a separate California animal welfare law; I profiled that Supreme Court case in an earlier Legal Planet post.)

Environmental Defense Center v. Bureau of Ocean Energy Management (6/3/2022)–In this case brought by California environmental organizations and the California Coastal Commission, the Ninth Circuit held that the federal Bureau of Ocean Energy Management (part of the U.S. Department of the Interior) violated the National Environmental Policy Act when it determined a federal proposal to allow offshore oil well stimulation treatments–including fracking–off the California coast would have no significant environmental impacts. The court found that BOEM's environmental assessment had failed to take the requisite "hard look" at potential environmental consequences of fracking as required by NEPA, and that a full environmental impact statement was required before the project could proceed. The panel also concluded that BOEM further erred by failing to undertake consultation with federal wildlife agencies as required under the ESA, and similarly failed to pursue "consistency review" of the project by the State of California as mandated by the federal Coastal Zone Management Act.

California State Water Resources Control Board v. Federal Energy Regulatory Commission (8/4/2022)–This Clean Water Act case involved the scope of the State of California's authority under CWA section 401, which requires states to provide a water quality certification before a federal license or permit can be issued for activities that may result in a discharge into intrastate navigable waters. The Federal Energy Regulatory Commission, which had received applications from California water agencies for hydroelectric water project licenses, ruled that California had waived its section 401 certification authority over those projects through undue delay and improper collaboration with the affected local water agencies. But the Ninth Circuit ruled against FERC, concluding that the State of California had not engaged in undue delay and had not improperly colluded with the affected water agencies. (This legal saga may not be over, however: the Ninth Circuit ruling is inconsistent with the 2018 decision of the U.S. Court of Appeals for the District of Columbia in a similar section 401 case. The U.S. Supreme Court may decide to take up the issue to resolve the inter-circuit conflict.)

Happy New Year.