San Francisco headquarters of the Ninth Circuit Court of Appeals

In 2016, at least, the U.S. Court of Appeals for the Ninth Circuit was the most important and influential court in the nation when it comes to environmental law. That's true for two reasons: first, the U.S. Supreme Court only issued one significant environmental law decision last year, in *U.S. Army Corps of Engineers v. Hawkes Co.*, dealing with the question of when a wetlands determination made by federal regulators under the Clean Water Act is subject to review by the federal courts. Second, the Ninth Circuit in 2016 continued its recent historical trend of issuing nearly 50 published opinions on a wide array of environmental and natural resource issues–far more than any other federal or state appellate court in the nation.

Here–in no particular order–is my compilation of the 15 most important of those Ninth Circuit environmental decisions from 2016.

Marilley v, Bonham. In this case, out-of-state commercial fishers challenged the California Department of Fish and Wildlife's practice of charging them higher fees for vessel registrations, fishing licenses and permits than the Department assesses California-based commercial fishers. Specifically, plaintiffs alleged that the differentiated fee and license system violates their rights under the Privileges and Immunities Clause of the U.S. Constitution. After a three-judge panel of the Ninth Circuit initially upheld plaintiffs' constitutional challenge, the full Circuit granted *en banc* review and last month issued a new decision upholding the disparate fee system, rejecting the fishers' Privileges and Immunities-based claim. *Marilley* is significant because it continues a steady, recent trend by the Ninth Circuit rejecting a host of constitutional challenges to California environmental regulations brought by out-of-state industry plaintiffs.

State of Missouri ex rel. Koster v. Harris. Somewhat related to *Marilley*, *Koster* involves a constitutional challenge brought by the Attorneys General of six midwestern and southern states to invalidate California's Proposition 2, a 2008 ballot initiative. Proposition 2, formally known as the Prevention of Farm Animal Cruelty Act, prohibits the confinement of egg-laying hens in cages that prevent them from lying down, standing up or turning around; the initiative bans the sale in California of eggs from hens maintained by farmers who violate the act. The state Attorneys General argued that Proposition 2 unfairly discriminates against out-of-state poultry companies in violation of Dormant Commerce Clause principles. The Ninth Circuit upheld a district court decision dismissing the constitutional challenge on standing grounds. Although the Attorneys General asserted *parens patriae* standing, the

Court of Appeals found that such standing requires "an interest apart from the interest of particular [private] parties." Here, ruled the Ninth Circuit, no such separate interest existed, and the poultry farmers were fully capable of filing the challenge themselves to protect their private financial interests.

Sierra Club v. Tahoe Regional Planning Agency. In this case, a Ninth Circuit panel rejected a lawsuit brought by two local Sierra Club chapters seeking to invalidate the 2012 Regional Plan for the Lake Tahoe Basin adopted by the bistate Tahoe Regional Planning Agency. The environmentalists claimed that the Regional Plan's provisions encouraging densification of future development in already-urbanized "community centers" and corresponding restoration of natural conditions in previously-developed outlying areas violated the bistate Tahoe Regional Planning Compact. The Ninth Circuit disagreed, finding that TRPA's approach conforms with Compact requirements and was not arbitrary and capricious.

Oregon *Coast Scenic Railroad, LLC v. State of Oregon Dept. of State* Lands. *Oregon Coast Scenic Railroad* is one of several 2016 federal preemption cases in the Ninth Circuit involving state or local environmental measures. Here the operator of a private tourist train operated on a federally-regulated railroad challenged the application of Oregon's "removal fill law," arguing that the operator was subject only to the jurisdiction of the federal Surface Transportation Law. The Ninth Circuit agreed, finding the Oregon law preempted. (*Oregon Coast Scenic Railroad* is especially relevant in California, where the same preemption issue is raised on similar facts in a separate case currently pending before the California Supreme Court [*Friends of the Eel River v. North Coast Railroad Authority (Northwestern Pacific Railroad Co.)*, No. S222472]; the identical issue has also been raised in connection with litigation brought against California's controversial High Speed Rail project.)

Syngenta Seeds, Inc. v. County of Kauai and *Atay v. County of Maui.* These related cases from Hawaii similarly raise the constitutional issue of preemption. Hawaiian local governments had enacted ordinances to regulate (in one case) and ban outright (in the other) genetically-engineered plants and crops. The Ninth Circuit found that both local measures were preempted–the one regulating GMOs by Hawaiian state law, the complete, local GMO ban by the federal Plant Protection Act.

Alaska Oil and Gas Assn. v. Jewell. Climate change was a key focus of several Ninth Circuit decisions in 2016. This decision was a natural follow-up to the D.C. Circuit's landmark 2013 opinion in *In re Polar Bear ESA Listing* [703 F.3d 1], upholding federal wildlife officials' listing of the polar bear as a threatened species under the ESA due to the projected loss of their sea ice habitat due to Arctic climate change. Within a year of any such listing, the ESA requires federal officials to designate habitat critical to the conservation of the species. The

government did so in this instance. The energy industry, concerned that the habitat designation would compromise their Arctic oil and gas exploration efforts, sued to challenge the habitat designation as excessive in scope. In its decision, however, the Ninth Circuit panel upheld the government's polar bear habitat designation as neither arbitrary, capricious or in contravention of applicable ESA provisions.

Alaska Oil and Gas Assn. v. Pritzker. The issue in *Alaska Oil and Gas Assn.* was whether the National Marine Fisheries Service's listing of sea ice seals under the Endangered Species Act was valid. Federal officials had based that listing decision on climate projections determining that the loss of Arctic sea ice would cause the seals to lose their natural habitat and thereby cause them to become endangered by the year 2095. The Ninth Circuit upheld the NMFS listing, finding wildlife officials' reliance on long-range climate projections to be reasonable and in conformance with the ESA. As Peter Gleick of the Pacific Institute has aptly observed, the implications of the *Alaska Oil and Gas Assn.* decision "are profound; [the Ninth Circuit] recognizes that climate change is a real threat, that climate science and models are scientifically sound, and that the Endangered Species Act requires we use information on future risks to protect species today, rather than waiting for the downward spiral of extinction to begin."

U.S. v. Estate of E. Wayne Hage. As newspaper headlines throughout 2016 attest, controversy reigns over how federally-owned public lands should be used and managed. The *Hage* case is the latest chapter in the long-running battle between a Nevada ranching family and the federal government over the family's unauthorized use of the public lands. It its opinion, the Ninth Circuit held that the Hage family cannot assert their alleged water rights as a defense in the face of the government's trespass action against the ranchers. (Expect these legal and political battles over the use and preservation of public lands–especially in the American West–to increase in the new presidential administration.)

Natural Resources Defense Council v. Pritzker. Speaking of long-running legal battles, NRDC has been litigating against the federal government for over a decade seeking to ban or limit the use of sonar technology by the U.S. Navy due to feared impacts on marine mammals. The Ninth Circuit ruled in NRDC's favor in this latest chapter of the NRDC/Navy litigation saga, holding that the National Marine Fisheries Service had violated the Marine Mammal Protection Act by failing to "effect the least practicable adverse impact on" marine mammal species, stock and habitat, as specifically required by the MMPA.

San Diego Navy Broadway Complex Coalition v. U.S. Department of Defense. The Ninth Circuit confronted another conflict between environmental concerns and the U.S. military in *San Diego Navy Broadway Complex*, involving a land use challenge to the Defense

Department's proposed redevelopment of a valuable four-block urban property owned by the Navy. Local environmentalists disputed the adequacy of the environmental impact statement the military had prepared in connection with the redevelopment project, claiming the EIS failed to adequately assess the threat of a terrorist attack on the military property. The Court of Appeals disagreed, finding that the military's EIS had given the requisite "hard look" under NEPA to the threat of terrorism at the Navy site.

Pacific Coast Federation of Fishermen's Assns. v. U.S. Dept. of Interior [2016 WL 3974183]. The Ninth Circuit's other most important NEPA decision of 2016 was, quite inexplicably, not certified for publication by the Court of Appeals. But it's nonetheless a most significant case for environmental and water law alike–especially in California. In its *PCFFA* opinion, the Ninth Circuit held that the U.S. Bureau of Reclamation's environmental assessment in support of the Bureau's approval of interim renewal contracts authorizing water delivery from federal reclamation facilities to water districts served by the Central Valley Project was invalid under NEPA. The court found that the Bureau had improperly characterized its repeated renewals of short-term, interim water delivery contracts as a "no action" alternative under NEPA. Instead, declared the Court of Appeals, the Bureau must give "full and meaningful consideration" to the alternative of reducing its interim contract water quantities as part of its NEPA process.

Pakootas v. Teck Cominco Chemical, Ltd. This decision represents the latest chapter in the longstanding efforts of Washington State-based Native American groups to address environmental damage to tribal lands along the Columbia River caused by upwind mining activities of a Canadian company operating north of the U.S.-Canadian border. The Ninth Circuit rejected the tribe's claim for compensation under the Comprehensive Environmental Response, Compensation and Liability Act, finding that the company could not under CERCLA be deemed to have arranged for the "disposal" of hazardous substances that were emitted by the smelter into the air, and subsequently contaminated land and water downwind.

Pesticide Action Network of North America v. USEPA. This litigation over federal pesticide licensing policy produced one of the few reported court cases castigating an environment agency for regulatory delay. The Ninth Circuit's short but blistering order, issued in August 2016, rejects EPA's request for yet another extension to conduct further studies before taking final action on proposed rule revoking a previously-issued certification of chlorpyrifos, a pesticide. EPA's delays in responding to environmental groups' administrative petition, charged the Court of Appeals, was part of longstanding agency pattern of "partial reports, missed deadlines, and vague promises of future action" over a nine-year period. Said the court, "nothing has changed that would justify EPA's continued

failure to respond to the pressing health concerns presented by chlorpyrifos." Ouch.

Center for Biological Diversity v. Bureau of Land Management. This case represents another quite significant decision interpreting and applying the Endangered Species Act. In *CBD,* the Ninth Circuit held that the "incidental take" requirements under sections 7 and 9 of the ESA do not apply to listed *plant* species; rather, concluded the Court of Appeals, the incidental take provisions apply only to listed fish and wildlife species.

United Cook Inlet Drift Assn. v. National Marine Fisheries Service. The final case on our "top 15" list deals with the key issue of federal ocean fisheries management. In *United Cook Inlet Drift Assn.,* the Ninth Circuit invalidated a National Marine Fisheries Service regulation removing three historic fishing areas from an ocean salmon fishery management plan, based on NMFS' conclusion that state regulation of the fishery was sufficient. Such deference by NMFS, declared the court, is plainly unauthorized under the Magnuson-Stevens Act; that Act plainly states that federal fisheries are to be governed by federal rules formulated in the national interest, not managed by states based on parochial concerns.

Happy New Year!