

Happy New Year!

As we move into 2018, let's take a look back at the most significant environmental law decisions issued by the U.S. Court of Appeals for the Ninth Circuit in 2017.

Conventional wisdom is that the second most important federal court in the nation (after the U.S. Supreme Court) is the D.C. Circuit Court of Appeals. I beg to differ: at least with respect to environmental and natural resources law cases, I strongly believe that the Ninth Circuit is the most influential federal tribunal other than the Supreme Court. That's due in major part to the sheer volume of environmental/natural resources opinions emanating from the Ninth Circuit. In 2017 that court continued its recent practice of issuing over 40 published environmental decisions—far exceeding the environmental law output of the D.C. Circuit. And, as the following list demonstrates, many of the Ninth Circuit's environmental opinions from last year are consequential indeed.



*James R. Browning U.S. Court of Appeals in San Francisco, CA and location of the San Francisco Ninth Circuit Courthouse*

Here, in no particular order, is my “greatest hits” summary of the 10 most important Ninth Circuit environmental decisions from 2017:

[\*Association des Eleveurs de Canards et d'Oies du Quebec v. Becerra\*](#). One prominent trend in the Ninth Circuit's 2017 environmental jurisprudence is the extent to which federal constitutional principles were invoked by opponents of state and local environmental laws to invalidate or limit the implementation of those laws—for the most part, unsuccessfully. The *Association des Eleveurs* case involved a Canadian trade organization's preemption challenge to the State of California's ban on the sale or distribution of foie gras in the state. Three years ago, the Ninth Circuit rejected a Dormant Commerce Clause-based challenge to California's foie gras ban. Undeterred, the plaintiff pursued a separate legal claim that the ban—predicated on animal welfare concerns—is preempted by the Federal Poultry Products Inspection Act. A unanimous Ninth Circuit panel disagreed, upholding the foie gras ban.

[\*State of Missouri ex rel. Koster v. Harris\*](#). This case, brought by a coalition of Midwest state attorneys general (including then-Oklahoma A.G. Scott Pruitt), claimed that California's animal welfare laws prohibiting chickens and certain other

farm animals from being confined in cages that don't allow them to turn around freely or fully extend their limbs, violate the Dormant Commerce Clause by impermissibly impeding interstate commerce. Unfortunately for the attorneys general, the Ninth Circuit never got to the merits: the Court of Appeals' instead upheld the district court's ruling that the attorneys general lacked Article III constitutional standing to bring the action. ( In hindsight, A.G. Pruitt and his colleagues laid an egg in pursuing this case...)

[Teixeira v. County of Alameda](#). This case, involving the intersection of federal constitutional law and local government's zoning authority, represents the latest chapter in a long-running battle by Mr. Teixeira to open a retail gun shop in Alameda County. The County denied Teixeira a conditional use permit for the proposed store, on the ground that it was proposed to be sited in a residential neighborhood in violation of the local zoning code. Teixeira sued, claiming that the permit denial violated his Second Amendment rights. The Ninth Circuit disagreed, in an *en banc* decision. As the decision succinctly concludes: "The act of selling firearms is not part of the {Second Amendment} right to `keep and bear arms.'"

[Marilley v. Bonham](#). This case rounds out our list of major Ninth Circuit decisions involving the intersection of environmental and constitutional law. In *Marilley*, out-of-state commercial fishers challenged—under the Privileges and Immunities Clause—the California Department of Fish and Wildlife's practice of charging them higher fishing license fees than those assessed on California-based commercial fishing companies. Reversing a three-judge appellate panel, an *en banc* Ninth Circuit found that the Department's disparate commercial fee system passed constitutional muster under the Privileges and Immunities Clause. Reportedly, this is the first reported federal court decision in the nation upholding such a two-tiered fishing license fee system. (*Marilley* was actually decided at the very end of December 2016, but the U.S. Supreme Court only denied the fishers' petition for certiorari in this closely watched case in October 2017.)

[Defenders of Wildlife v. Zinke](#). This case involves the increasingly common legal and policy conflict between competing environmental goals: expanded deployment of and dependence on renewable energy sources vs. protection of wildlife species and natural landscapes. *Defenders of Wildlife* involved an environmental organization's challenge to a U.S. Bureau of Land Management-issued permit for construction of a large industrial solar farm project in the Mojave Desert. Plaintiffs claimed that issuance of the permit, and the interagency consultation process that preceded it, violated the Endangered Species Act due to the alleged destruction of

critical habitat for the ESA-listed desert tortoise. The Ninth Circuit rejected the challenge, holding that the federal agencies' finding that no mitigation measures were required because the solar project was unlikely to adversely affect the tortoise's habitat was not arbitrary or capricious.

[\*Ground Zero Center for Non-Violent Action v. U.S. Department of the Navy\*](#). This case involved a National Environmental Policy Act-based challenge to the proposed expansion of a nuclear submarine operating center by the U.S. Navy. The Ninth Circuit held that the environmental impact statement prepared by the Navy in connection with the project violated NEPA. Specifically, the court found that documents not disclosed by the Navy in the EIS failed to meet applicable standards for withholding unclassified military information.

[\*Natural Resources Defense Council v. U.S. Environmental Protection Agency\*](#). In this case, the Ninth Circuit held that substantial evidence failed to support USEPA's findings under the Federal Insecticide, Fungicide and Rodenticide Act that registering the pesticide "NSPW" was in the public interest, based on the flawed assumption that users would replace more harmful products with the pesticide in question, or that incorporating the newly-registered pesticide into new products wouldn't increase the amount of silver released into the environment.

[\*Agua Caliente Band of Cahuilla v. Coachella Valley Water District\*](#). In 2017, the Ninth Circuit issued several key natural resources decisions involving Native American rights. Of these, the most important—and perhaps the Ninth Circuit's most politically controversial—environmental decision of 2017 was the *Agua Caliente* case. There the Court of Appeals held that the United States impliedly reserved a general groundwater right when it established the Tribe's reservation in California's Coachella Valley. *Agua Caliente* is the first reported federal court decision applying the so-called *Winters* reserved water rights doctrine to groundwater (as opposed to surface water) resources. (Despite support from a 15-state coalition led by the State of Nevada, the U.S. Supreme Court denied the water district's petition for certiorari in late 2017.)

[\*United States v. Washington\*](#). In this case, the Court of Appeals held that the State of Washington violated the Stevens Treaties of 1854-55 between Indian tribes and the Governor of what was then the Washington Territory by building culverts that prevent the upstream and downstream migration of salmon. The nineteenth century treaty, declared the Ninth Circuit, required the future state to ensure that the salmon populations would remain available to the tribes in perpetuity for tribal

sustenance and cultural purposes.

[\*Navajo Nation v. Department of the Interior\*](#). This Native American/water rights case, decided at the end of 2017, is the third evincing the Ninth Circuit ongoing concern for Native American rights. *Navajo Nation* involved competing claims to the increasingly scarce waters of the Colorado River Basin. Following a lengthy, unprecedented drought in the Basin, the U.S. Department of the Interior issued new guidelines to determine how the resulting water shortages would be allocated among the seven Colorado Basin states that have judicially-approved rights to Colorado River water. The Navajo Nation, which occupies reservation lands along the Colorado River but has no judicially-decreed rights to its waters, sued the Department, alleging that the guidelines, by ignoring the water needs of the tribe, constitute a breach of the federal government's fiduciary trust responsibilities to the Navajo Nation. The district court had dismissed the case, finding that the tribe lacked legal standing to bring the lawsuit, and that its claim was barred by sovereign immunity. The Ninth Circuit reversed on both issues, finding that the Navajo Nation had Article III standing, and that the tribe's breach of trust claim is not barred by sovereign immunity principles. *Navajo Nation* injects a new degree of complexity and uncertainty to the already-fractious fight over shrinking Colorado River water triggered by persistent drought conditions and related climate change impacts. The Ninth Circuit's decision at least intimates that the tribe has a legitimate right to be at the table when those shrinking Colorado River water rights are allocated prospectively.