Chapter 13 • FOREST RESOURCES
2015 Annual Report[1]

I. DEVELOPMENTS IN FEDERAL LITIGATION

A. National Forest Roadless Area Management

Fifteen years after promulgation, the 2001 Roadless Area Conservation Rule (Clinton rule)[2] continues to provide job security for environmental lawyers.

In 2013, Alaska, with the nation's two largest national forests, lost its challenge to the Clinton rule after a district court ruling that Alaska's challenge was untimely.[3] On November 7, 2014, the Court of Appeals for the District of Columbia reversed the district court's order granting the United States' motion to dismiss, which effectively revives the claims brought by the State of Alaska against the Clinton rule.[4] In *Organized Village of Kake v. U.S. Department of Agriculture*,[5] a divided Ninth Circuit panel upheld the U.S. Forest Service's decision to temporarily exempt the Tongass National Forest from the Clinton rule under the Administrative Procedure Act (APA), but remanded the case to the federal district court to consider plaintiffs' National Environmental Policy Act (NEPA) claims. Plaintiffs subsequently filed a petition for rehearing en banc,[6] and the Ninth Circuit reversed itself,[7] finding that the U.S. Forest Service violated the APA in exempting the Tongass National Forest from the Clinton rule. The court vacated the Tongass Exemption and reinstated application of the Clinton rule to the Tongass National Forest in Alaska. The State of Alaska has filed a petition for writ of certiorari with the U.S. Supreme Court.[8]

In Colorado, the Department of Agriculture is undertaking a rulemaking to reinstate the North Fork Coal Mining Area exception to the Colorado Roadless Rule.[9] This rulemaking is the result of a successful lawsuit challenging the Bureau of Land Management's (BLM) and U.S. Forest Service's decisions to allow exploration and modification of existing coal leases within the North Fork Coal Mining Area. A

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[2]36 C.F.R. §§ 294.10-294.14 (2001). Idaho and Colorado are not subject to the Clinton rule because they have both promulgated state-specific roadless rules. *See* Idaho Roadless Area Management, 36 C.F.R. §§ 294.20-294.29 (2013); Colorado Roadless Area Management, 36 C.F.R. §§ 294.40-294.49 (2013).

[3]Alaska v. U.S. Dep't of Agric., 932 F. Supp. 2d 30 (D.D.C. 2013) (order granting motion to dismiss).

[4]Alaska v. U.S. Dep't of Agric., 772 F.3d 899, 900 (D.C. Cir. 2014).

[5]746 F.3d 970, 980 (9th Cir. 2014).

[6]*See* Organized Vill. of Kake v. U.S. Dep't of Agric., 765 F.3d 1117, 1118 (9th Cir. 2014).

[7]Organized Vill. of Kake v. U.S. Dep't of Agric., 795 F.3d 956, 967 (9th Cir. 2015).

[8]Alaska v. Organized Vill. of Kake, Alaska, No. 15-467 (U.S. filed Oct. 14, 2015).

[9]Roadless Area Conservation; National Forest System Lands in Colorado, 80 Fed. Reg. 72,665 (Nov. 20, 2015).

Supplemental Environmental Impact Statement has been prepared to complement the 2012 Environmental Impact Statement completed for the Colorado Roadless Rule.

B. Federal Court Cases

In *W.E. Partners II, LLC v. United States*,[10] W.E. Partners II, LLC, a company formed to construct a biomass facility in North Carolina, filed suit in the U.S. Court of Federal Claims, claiming that the government failed to fulfill its mandatory obligation under the Recovery Act to award a reimbursement grant for the construction of its biomass facility. The court granted summary judgment in favor of the government, holding that the Department of Treasury's decision to reimburse the biomass facility only for costs allocable to production of electrical energy was lawful.[11] The court deferred to the agency's interpretation of section 1603 of the Recovery Act and corresponding agency guidance.[12]

In *Swanson Group Manufacturing LLC v. Jewell*,[13] timber interests sued the Secretaries of the Interior and Agriculture for violating the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act (O & C Act) by failing to sell the allowable quantity of timber on federal lands in Oregon. In addition, plaintiffs claimed that the agencies failed to comply with the requirement for notice and comment under the APA when establishing the Owl Estimation Methodology, which is used to ensure timber sales comply with the Endangered Species Act.[14] The district court found in favor of plaintiffs on both the O & C Act and Endangered Species Act claims.[15] On appeal, the D.C. Circuit held that plaintiffs were unable to establish Article III standing because plaintiffs failed to allege a concrete and particularized injury in their declarations.[16] Accordingly, the court vacated the district court's decision and remanded the case for dismissal.[17]

In *Cascadia Wildlands v. Bureau of Indian Affairs*,[18] the Ninth Circuit affirmed the district court's grant of summary judgment in favor of the Bureau of Indian Affairs (BIA). Plaintiffs claimed that the BIA violated NEPA and the Coquille Restoration Act in its approval of the Coquille Indian Tribe's Middle Forks Kokwel timber sale. Plaintiffs claimed that the sale violated NEPA because the BIA failed to take proper account for impacts from the Alder/Rasler logging project, a logging project on adjacent land that had already been approved but was not completed.[19] The Ninth Circuit disagreed, holding that the BIA considered the cumulative effect of both projects in accordance with NEPA.[20] Plaintiffs also alleged that the timber sale violated the Coquille Restoration Act because it was inconsistent with the U.S. Fish and Wildlife Service's recovery plan for the Endangered Species Act-listed northern spotted owl. The Ninth Circuit disagreed, holding that the Coquille Restoration Act did not require compliance with the Fish and Wildlife Service's recovery plan.[21]

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[10] 119 Fed. Cl. 684, 687 (2015).
[11] *Id.* at 687.
[12] *Id.* at 694.
[13] 790 F.3d 235 (D.C. Cir. 2015).
[14] *Id.* at 239.
[15] *Id.*
[16] *Id.* at 242.
[17] *Id.* at 238, 246.
[18] 801 F.3d 1105 (9th Cir. 2015).
[19] *Id.* at 1110.
[20] *Id.* at 1113-14.
[21] *Id.* at 1114.

In *Cottonwood Environmental Law Center v. U.S. Forest Service*,[22] the Ninth Circuit affirmed the district court's grant of summary judgment in favor of an environmental organization, concluding that the U.S. Forest Service violated section 7 of the Endangered Species Act when it failed to reinitiate consultation after the Fish and Wildlife Service revised the critical habitat designation for the Canada lynx to include National Forest System land.[23] The court denied injunctive relief to the environmental organization because it failed to demonstrate that the Canada lynx would suffer irreparable injury.[24] The panel recognized that the presumption of irreparable harm in *Thomas v. Peterson*[25] was no longer good law following two U.S. Supreme Court cases addressing injunctive relief, *Winter v. Natural Resources Defense Council, Inc*.[26] and *Monsanto Co. v. Geertson Seed Farms*.[27]

In *Pit River Tribe v. Bureau of Land Management*,[28] the Ninth Circuit reversed the district court's grant of summary judgment in favor of the United States. Plaintiffs brought suit against a handful of federal agencies and the Calpine Corporation alleging that the continuation of twenty-six geothermal leases authorized by the BLM in the Medicine Lake Highlands area of the Klamath and Modoc National Forests violated NEPA, the National Historic Preservation Act (NHPA), the National Forest Management Act (NFMA), and the agencies' fiduciary obligations to Native American Tribes.[29] The district court concluded that plaintiffs did not have prudential standing to bring their claims because their claims did not fall with the zone of interest of the lease-continuation provision of the Geothermal Steam Act.[30] The Ninth Circuit disagreed, finding that plaintiffs' allegations included claims related to the Geothermal Steam Act's lease-extension provision.[31] The court remanded the case for further analysis of the merits of plaintiffs' claims.[32]

Last year we reported on a decision by the Court of Appeals for the Ninth Circuit to reopen the Moonlight Fire Litigation to address allegations of unethical conduct engaged in by the California Department of Forestry and Fire Protection (CAL FIRE) associated with cost recoupment litigation arising from a wildfire in 2007 that burned approximately 65,000 acres in Plumas County, California, (the Moonlight Fire) and a $55 million settlement reached with Sierra Pacific Industries (Sierra Pacific).[33] In our last report, the U.S. District Court for the Eastern District of California had, sua sponte, requested that the Ninth Circuit Court of Appeals Judge Alex Kozinski assign a judge outside of the Eastern District of California to the matter, but Judge Kozinski declined and reassigned the case to Senior Judge William B. Shubb in the Eastern District of

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[22] 789 F.3d 1075 (9th Cir. 2015).
[23] *Id.* at 1084-85.
[24] *Id.* at 1091.
[25] *Id.* at 1089; 753 F.2d 754, 764 (9th Cir. 1985).
[26] 555 U.S. 7 (2008).
[27] 561 U.S. 139 (2010).
[28] 793 F.3d 1147 (9th Cir. 2015).
[29] *Id.* at 1153.
[30] *Id.* at 1154-55; *see also* 30 U.S.C. § 1005(a) (2015) (Geothermal Steam Act lease provision).
[31] *Pit River Tribe*, 793 F.3d at 1158; *see also* 30 U.S.C. § 1005(g) (2015) (Geothermal Steam Act lease extension provision).
[32] *Id.* at 1159.
[33] United States v. Sierra Pac. Indus., No. 2:09-cv-02445-KJM-EFB (E.D. Cal. Oct. 15, 2014).

California.[34] After limited briefing, on April 17, 2015, Judge Shubb issued a decision denying Sierra Pacific's motion to set aside the judgment and a motion for a temporary stay of the settlement agreement.[35] In this decision, the court held that the government's failure to turn over important documents did not rise to the level of fraud on the court, defendants made a calculated decision to settle at the time of the judgment, and "[d]efendants have failed to identify even a single instance of fraud on the court, certainly none on the part of any attorney for the government"; "[s]tripped of all its bluster, defendants' motion is wholly devoid of any substance."[36] Sierra Pacific has appealed the decision, and five state attorneys general have filed an amicus brief urging the Ninth Circuit to reverse the decision.[37] As part of its appeal and request for reversal, Sierra Pacific has also requested recusal of Judge Shubb if the case is reversed, based on concerns regarding improper conduct by Judge Shubb due to apparent posts on Twitter and YouTube concerning the case, although state attorneys argue that the author of the postings is subject to dispute.[38]

II. DEVELOPMENTS IN STATE COURTS

In *State of Wyoming v. Black Hills Power, Inc.*,[39] the Wyoming Supreme Court adopted the free public services doctrine[40] in response to three certified questions from the U.S. District Court for the District of Wyoming regarding the state's ability to recover expenses incurred from suppressing a wildfire resulting from the negligence of a third party.[41] This case arose from a landowner's suit against Black Hills Power, Inc. (Black Hills), alleging that its negligent operation, inspection, and maintenance of its

[34]United States v. Sierra Pac. Indus., No. 2:09-cv-02445-KJM-EFB (E.D. Cal. Oct. 23, 2014) (order reassigning case).
[35]United States v. Sierra Pac. Indus., 100 F. Supp. 3d 948 (E.D. Cal. 2015).
[36]*Id.* at 981.
[37] United States v. Sierra Pac. Indus., No. 2:09-cv-02445-WBS-AC (E.D. Cal. Apr. 20, 2015), No. 15-15799 (9th Cir. Apr. 21, 2015); Brief for Attorneys General for the States of Arizona, Nebraska, Nevada, Utah, and Wisconsin as Amicus Curiae Supporting Appellants and Reversal, United States v. Sierra Pac. Indus., No. 15-15799 (9th Cir. Nov. 13, 2015).
[38]*See* Appellants' Opening Brief, United States v. Sierra Pac. Indus., *appeal docketed*, No. 15-15799 (9th Cir. Nov. 6, 2015); Appellants' Motion for Judicial Notice or, in the Alternative, Motion to Supplement the Record on Appeal, United States v. Sierra Pac. Indus., No. 15-15799 (9th Cir. Nov. 6, 2015); United States' Opposition to Appellants' Motion for Judicial Notice and Request to Strike References and Arguments from Appellants' Briefs, United States v. Sierra Pac. Indus., No. 15-15799 (9th Cir. Nov. 19, 2015).
[39]354 P.3d 83 (Wyo. 2015).
[40]The free public services doctrine is a general common law rule which provides that "absent specific statutory authorization, a governmental entity cannot recover the costs of providing public services from a tortfeasor whose conduct caused the need for such services." *Id.* at 85-86.
[41]The federal court certified the following three questions to the Wyoming Supreme Court: (1) whether the state could recover fire suppression and/or emergency services costs from a negligent third party that created the need for the services; (2) if not, whether the state could recover such expenses on portions of lands that were state lands; and (3) if the state could recover expenses from damages on state lands, would the state's recovery be limited in any way, such as to a pro rata share of costs based on the state's percentage of total acres affected by the fire. *Id.* at 84.

transmission line ignited "the Oil Creek Fire, [which] allegedly consumed more than 61,000 acres" of land.[42] The State of Wyoming intervened and sought recovery of damages to approximately 9,857 acres of state land and approximately $5,213,000 in fire suppression expenses.[43] Black Hills moved to dismiss the state's claims on the basis that costs of a government entity are not recognized by common law absent a specific statutory authorization (i.e., the free public services doctrine).[44] In response, the State of Wyoming argued that even if the state recognized the free public services doctrine, the exception to the general rule would apply, allowing recovery of government expenses incurred to protect its own property.[45] In response to the three certified questions from the federal court, the Wyoming Supreme Court: (1) adopted the free public services doctrine and found that there was no statutory provision allowing for recovery in this instance;[46] (2) adopted the exception to the general rule allowing recovery of the costs of services where portions of the lands protected by the fire suppression were state lands;[47] and (3) found that although as a matter of law the state's recovery is not limited in any way, there were questions of fact requiring further resolution by the federal court.[48]

In *State of Washington, Department of Natural Resources v. Public Utility District No. 1 of Klickitat County*,[49] the Washington Court of Appeals upheld a trial court's decision that a municipal corporation such as a public utility district is a "person" (or alternatively a "corporation") within the meaning of the state fire cost recovery statute authorizing the Washington Department of Natural Resources (DNR) to pursue a cost recovery claim.[50] The case arose out of a forest fire near Lyle, Washington, resulting in damage to 2,100 acres after a tree fell on a power line owned and operating by the Public Utility District No. 1 of Klickitat County (PUD) resulting in more than $1.6 million in fire suppression costs.[51] DNR commenced an action against the PUD after its investigation concluded that the fire was caused by PUD's negligence in failing to remove the tree near its electrical lines.[52] The PUD filed a motion to dismiss, arguing that municipal corporations are not identified entities in the statute and a monetary judgment against another taxpayer-funded entity is against Washington public policy.[53] Since the statute did not include a definition of the term "person," the court conducted a review of the statute's legislative history and a plain meaning analysis, and ultimately found "strong support for a permissively broad reading of 'person'" and that the reference to "any person, firm, or corporation" plainly includes municipal corporations.[54]

III. DEVELOPMENTS IN FEDERAL LEGISLATION, DIRECTIVES, AND POLICY

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[42] *Id.* at 85.
[43] *Id.*
[44] *Black Hills Power*, 354 P.3d at 85.
[45] *Id.*
[46] *Id.* at 85-88 (citing City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co., 719 F.2d 322 (9th Cir. 1983); Dist. of Columbia v. Air Fla., Inc., 750 F.2d 1077 (D.C. Cir. 1984)).
[47] *Black Hills Power*, 354 P.3d at 88.
[48] *Id.* at 88-89 (indicating that the questions, briefs, and arguments posed several unknowns regarding whether the state had expended funds because of its obligations under an agreement with Weston County or because it was incurring the expenses to protect its property).
[49] 349 P.3d 916 (Wash. Ct. App. 2015).
[50] *Id.* at 918.
[51] *Id.*
[52] *Id.*
[53] *Id.* (referring to WASH. REV. CODE § 76.04.495 (2015)).
[54] *Klickicat Cnty.*, 349 P.3d at 919-22.

In last year's edition, we reported that the Agricultural Act of 2014 (P.L. 113-79 or the Farm Bill), signed into law by President Obama on February 7, 2014, included a notable provision that amended the Clean Water Act (CWA) to exclude certain silviculture activities from National Pollutant Discharge Elimination System (NPDES) permitting requirements.[55] However, despite a decision from the U.S. Supreme Court in *Decker v. Northwest Environmental Defense Center*,[56] reversing a 2011 Ninth Circuit decision, the Ninth Circuit revived the specific issue as to whether stormwater discharges collected in a system of ditches, culverts, and channels are point sources to which a CWA NPDES permit requirement would apply.[57] As a result of this litigation, the U.S. Environmental Protection Agency (EPA) has entered into an agreement, which has been approved by the Ninth Circuit, to consider and issue proposed and final rulemaking deciding whether CWA section 402(p)(6) requires that stormwater discharges from forest roads be regulated.[58] In accordance with the agreement and the court's order, EPA published a Notice of Opportunity to Provide Information on Existing Programs That Protect Water Quality From Forest Road Discharges on November 10, 2015.[59]

The Forest Service continues to implement its 2012 Planning Rule[60] that sets forth detailed process and content requirements for the development, amendment, and revision of land and resource management plans (also known as "forest plans"). During 2015, the Forest Service issued the final version of its Forest Service Manual and Handbook "Directives" to guide implementation of the 2012 Planning Rule.[61] During 2015, the agency also continued with revising several "pilot" forest plans for various national forests.[62] The Forest Service is also proceeding with an amendment of the forest plan for the Tongass National Forest under 2012 Planning Rule provisions.[63]

Last year, we reported that the U.S. Forest Service issued its proposed Groundwater Management Directive for public comment.[64] The proposed directive

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[55]Agricultural Act of 2014, Pub. L. 113-79, 128 Stat. 649 (2014). *See also* KATIE HOOVER, CONG. RESEARCH SERV., FORESTRY PROVISIONS IN THE 2014 FARM BILL at 7(P.L. 113-79) (MAR. 2014), *available at* http://nationalaglawcenter.org/wp-content/uploads/assets/crs/R43431.pdf.

[56]133 S. Ct. 1326 (2013).

[57]Nw. Envtl. Def. Ctr. v. Decker, 728 F.3d 1085 (9th Cir. 2013).

[58]*In re* Envtl. Def. Ctr., No. 14-80184 (9th Cir. Sept. 14, 2015) (joint motion for entry of order); Juan Carlos Rodriguez, *EPA Agrees to Review Runoff Regulations in 9th Circ.*, Law360 (Sept. 16, 2015, 4:25 PM), http://www.law360.com/articles/703471/epa-agrees-to-review-runoff-regulations-in-9th-circ (subscription).

[59]80 Fed. Reg. 69,653 (Nov. 10, 2015); *see also* Notice of an Extension to Provide Information on Existing Programs That Protect Water Quality From Forest Road Discharges, 80 Fed. Reg. 78,728 (Dec. 17, 2015) (extending the comment period for an additional 32 days from January 11, 2016, to February 12, 2016).

[60]National Forest System Land Management Planning Directives, 78 Fed. Reg. 13,316 (Feb. 27, 2013).

[61]National Forest System, Land Management Planning Directives, 80 Fed. Reg. 6683 (Feb. 6, 2015).

[62]*See, e.g.*, Plan Revisions for the Inyo, Sequoia and Sierra National Forests; California and Nevada, 79 Fed. Reg. 51,536 (Aug. 29, 2014).

[63]Environmental Impact Statements; Notice of Availability, 80 Fed. Reg. 72,719 (Nov. 20, 2015) (EIS No. 20150328, Draft, USDA, AK, Tongass Land and Resource Management Plan Amendment).

[64]Proposed Directive on Groundwater Resource Management, Forest Service Manual 2560, 79 Fed. Reg. 25,815 (May 6, 2014).

would have required Forest Service and special use permit holders of groundwater on U.S. Forest Service lands to implement water conservation measures; analyze the impact that existing and proposed uses may have on groundwater resources; and monitor, report, and mitigate large groundwater withdrawals and injections.[65] However, in June 2015, the U.S. Forest Service issued a notice withdrawing the proposed directive.[66] The notice stated that response to the proposed directive from conservation organizations and tribes was generally favorable, but that states and a number of other organizations raised concerns that the proposal would exceed the U.S. Forest Service's legal authority and infringe on state water allocation authority.[67] The notice stated that the U.S. Forest Service will have further discussions with states and other "key publics" to develop new proposed directives regarding the evaluation and monitoring of effects to groundwater on National Forest System lands.[68]

[65] *Id.* at 25,816.
[66] Proposed Directive on Groundwater Resource Management, Forest Service Manual 2560, 80 Fed. Reg. 35,299 (June 19, 2015) (notice of withdrawal of proposed directive).
[67] *Id.* at 35,299.
[68] *Id.*