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Legal Update



FORESTRY STRATEGIES AND INNOVATIONS
LEGAL UPDATE

Sara Ghafouri, General Counsel

February 12, 2025

Supreme Court Cases in 2024

- *Loper Bright Enterprises v. Raimondo*
- *Corner Post v. Board of Governors*
- *Seven County Infrastructure Coalition v. Eagle County*

Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024)

- National Marine Fisheries Service's 2020 Rule under the Magnuson-Stevens Fishery Conservation and Management Act.
- Required commercial fishing vessels to pay for on-board observers.
- Supreme Court 6-3 decision authored by Chief Justice Roberts.
- Overruled 40-year old *Chevron* deference doctrine.
 - “[A]gencies have no special competence in resolving statutory ambiguities. Courts do.”
 - “[W]hen faced with a statutory ambiguity in such a case, the ambiguity is not a delegation to anybody, and a court is not somehow relieved of its obligation to independently interpret the statute.”
 - Agency interpretation can still be persuasive, but courts must look at text, context, and congressional intent.



Fishing vessel Dyrsten, one of several boats named in *Loper Bright v. Raimondo*.

Photo: Rachel Wisniewski/Bloomberg/Getty Images

Corner Post v. Board of Governors of Federal Reserve System, 144 S. Ct. 2440 (2024)



Photo: Supreme Court website

- Petitioner Corner Post is a convenience store and truck stop in Watford City, North Dakota, that opened for business in 2018.
- Prior to Corner Post, 28 U.S.C. § 2401 (a) was understood to set a statute of limitations that lasted six years from the date of final agency action.
- The Supreme Court's 6-3 decision, authored by Justice Barret, held that when a plaintiff brings a claim against a federal agency under the APA, the six-year statute of limitations begins on the date when a plaintiff suffers injury from a final agency action.

Seven County Infrastructure Coalition v. Eagle County

- Involves an 88-mile railroad project aimed at connecting the Uinta Basin in Utah to the national rail network.
- Plaintiffs arguing that the Surface Transportation Board did not sufficiently analyze climate impacts, even though such an analysis is beyond the agency's jurisdiction and expertise.
- AFRC and Western Energy Alliance filed an *amicus curiae* brief in support of Seven County Infrastructure Coalition.
- Question presented: Whether NEPA requires an agency to study environmental impacts beyond the proximate effects of the action over which the agency has regulatory authority.



Photo: The Federalist Society

Potential Supreme Court Case in 2025

- *Marin Audubon v. FAA*

Marin Audubon Society, et al. v. FAA, 121 F.4th 902 (2024).

- Marin Audubon Society challenged the Air Tour Management Plan issued by the National Park Service and the Federal Aviation Administration regarding tourists' flights over four national parks in the San Francisco area.
- The D.C. Circuit held that CEQ lacks the authority to issue regulations governing the implementation of NEPA, which have been in place for almost 50 years.
 - The majority rejected that President Carter's Executive Order 11991 somehow transformed CEQ into a regulatory agency.



Photo: Tada Images / Shutterstock.com

Marin Audubon Society, et al. v. FAA, 121 F.4th 902 (2024).

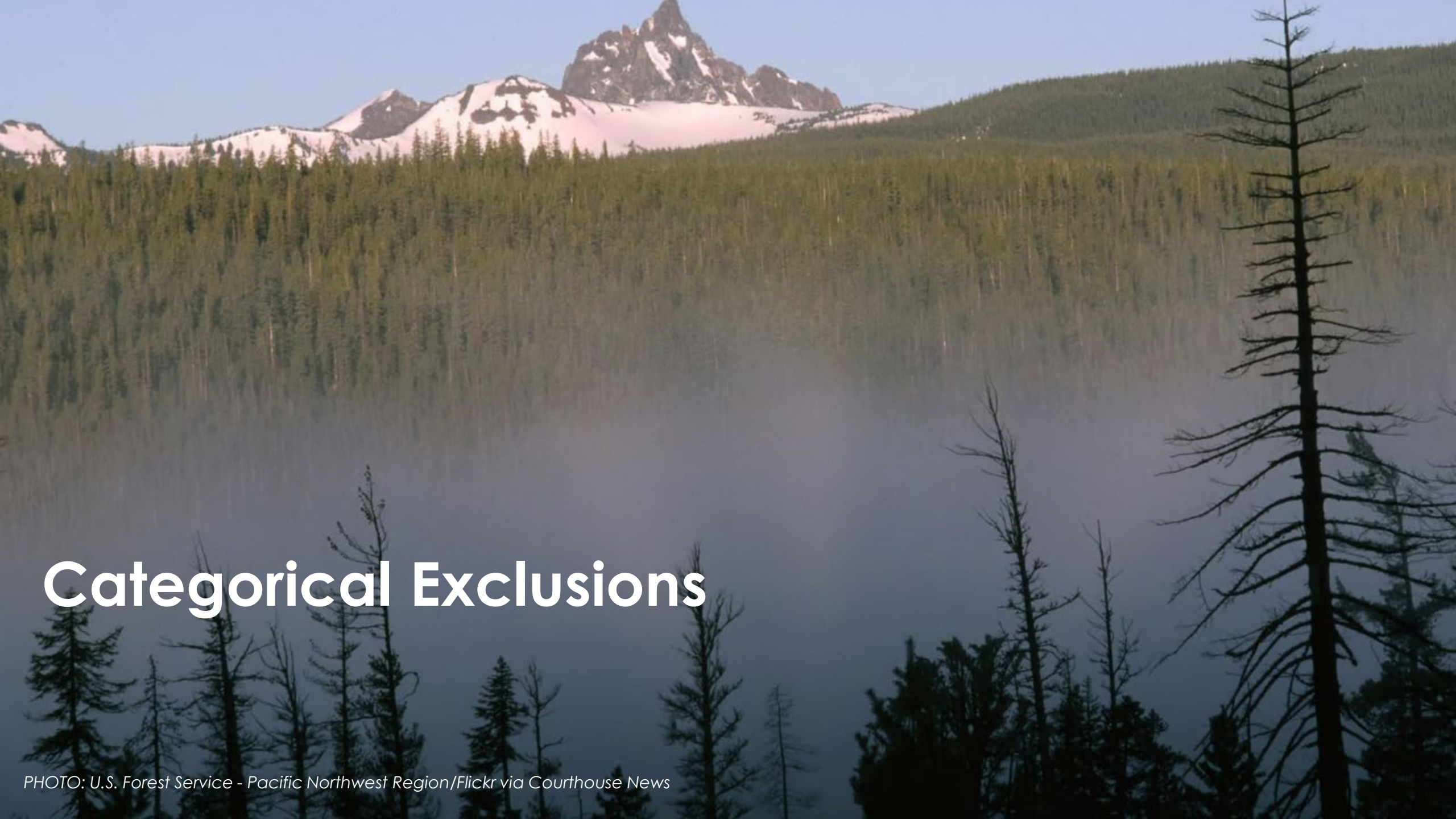
- Both Marine Audubon Society and the Government filed petitions for rehearing en banc, which were denied.
- Chief D.C. Circuit Judge Sri Srinivasan was on the D.C. panel and dissented to the majority's decision that CEQ has no authority to issue NEPA implementing regulations.
- In denying rehearing en banc, Judge Sri Srinivasan issued a statement, joined by Circuit Judges Millett, Pillard, Wilkins, Childs, Pan, and Garcia, explaining why he did not endorse en banc review.
 - "The panel unanimously ruled in favor of the challenge in this case on an entirely separate ground (one that the parties did raise and brief), meaning that the panel majority's rejection of the CEQ's authority to issue binding NEPA regulations was unnecessary to the panel's disposition."



Photo: Tada Images / Shutterstock.com

Litigation Trends

- *Forest Service's Categorical Exclusions*
- *Condition-based Management*



Categorical Exclusions

PHOTO: U.S. Forest Service - Pacific Northwest Region/Flickr via Courthouse News

Forest Service's 2020 Categorical Exclusions

Clinch Coalition v. U.S. Forest Service

- In 2020, the Forest Service adopted six new and expanded categorical exclusions.
- Clinch Coalition et al. challenge three of the newly adopted categorical exclusions and CEQ's 2020 Rule, which modified the definition of categorical exclusions.
 - 36 C.F.R. 220.6(e)(3) – Special uses that require less than 20 acres of National Forest System (NFS) lands.
 - 36 C.F.R. 220.6(e)(24) – Construction and realignment of up to 2 miles of NFS roads.
 - 36 C.F.R. 220.6(e)(25) - Forest and grassland management activities with a primary purpose of meeting restoration objectives or increasing resilience. Activities to improve ecosystem health, resilience, and other watershed and habitat conditions may not exceed 2,800 acres.
- AFRC, Federal Forest Resource Coalition, and American Loggers Council are participating as Defendant-Intervenors.

Timber Stand Improvement Categorical Exclusion

Oregon Wild v. U.S. Forest Service

- The Ninth Circuit upheld the U.S. Forest Service's use of the timber stand and/or wildlife habitat categorical exclusion for three Projects—Baby Bear, Bear Wallow, and South Warner—on the Fremont-Winema National Forest. The Projects' commercial harvest covers a range of 3,000 to 16,000 acres.
- The Ninth Circuit remanded Oregon Wild's facial challenge against the timber stand improvement categorical exclusion in light of the Supreme Court's *Corner Post* decision to determine whether their claim is time barred.
- On remand, Plaintiffs are attempting to add a new plaintiff to revive their facial challenge.



Photo: WildEarth Guardians website



Condition-Based Management

PHOTO BY Nancy Shultz

Twisp Restoration Project

North Cascades Conservation Council v. U.S. Forest Serv.

- About 21,000 acres of conditioned-based management out of the 24,000 acres of treatments: 13,812 acres non-commercial thinning; and 8,151 acres commercial treatments.

- Conditioned-based management allows land managers to make landscape-level decisions while reserving agency flexibility to respond to the current, on-the-ground conditions.

- Chief Judge Stanley Bastian found that condition-based management complied with NEPA because the “Forest Service estimated stand characteristics throughout the Project Area, identified which of those stands may be thinned or otherwise treated, detailed the prescription that would apply to the thinning or treatment in each area, as well as assessing the potential effects of those actions.”

- Ninth Circuit argument will be held on Friday, February 14.



Photo: USFS website

Central/West Slope Project *John Muir Project v. U.S. Forest Serv.*

- In 2022, the Forest Service proposed the Community Protection Concept (CPC), which has been divided into two separate projects—the Central/West Slope Project and the Eastside Project.
- In September 2023, the Forest Service issued the First Decision Notice under the Central/West Slope Project EA. This Project authorizes fuels reduction and other vegetation treatments to mitigate wildfire risk to communities and critical infrastructure on 217,721 acres.
- Second Decision Notice is anticipated in February 2025.

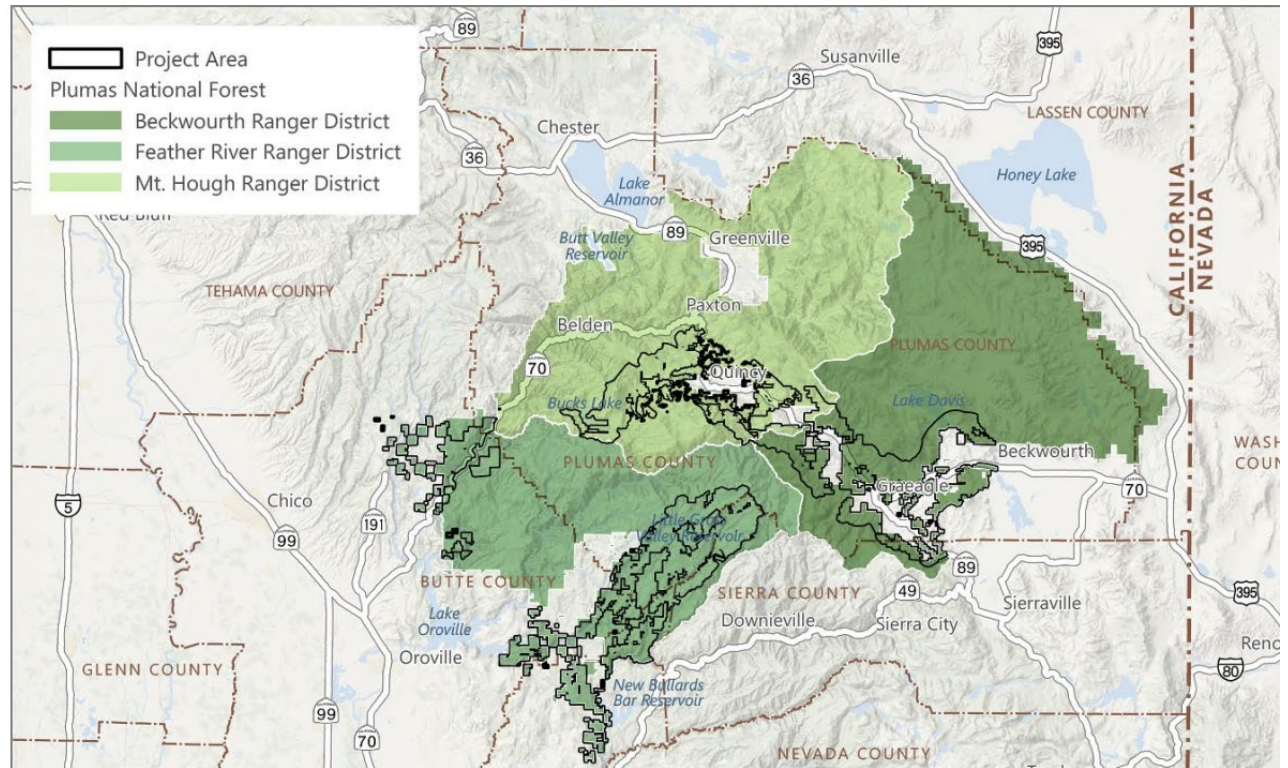


Photo: U.S. Forest Service

2025 Litigation Predictions

- Challenges to President Trump's Executive Orders
- Increase in NGOs' challenges to forest management projects
 - Condition-based management
 - Large-scale forest management projects
 - Projects authorized under a categorical exclusion
- Potential settlement related to challenges to Biden Administration rulemaking (e.g., BLM's Public Lands Rule)
- Northwest Forest Plan Amendment



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PAUL

HASTINGS

LOOKING AHEAD:

**THE EVOLVING LEGAL AND POLICY
LANDSCAPE**

February 12, 2025

FEDERAL LANDSCAPE: CHANGES IN DOCTRINE

Major Questions Doctrine

- *West Virginia v. EPA* (2022): Federal agencies must point to “clear congressional authorization” for the power they claim in “extraordinary cases” where the agency action would effect an historic reordering/change

Deference to Agency Interpretation of Statutes

- *Loper-Bright Enterprises v. Raimondo* (2024): Federal courts “must exercise their independent judgment in deciding whether an agency has acted within its statutory authority” and no longer defer to an agency’s reasonable interpretation of an ambiguous statute (“*Chevron*” deference)



Image Source: www.washingtontimes.com

FEDERAL LANDSCAPE: CHANGES IN DOCTRINE

Extended Statute of Limitations for APA Actions

- *Corner Post v. Board of Governors* (2024): The 6-year time limit to bring a lawsuit against a federal agency under the Administrative Procedure Act does not begin until a plaintiff is injured by the agency's action

Right to a Jury Trial in Administrative Penalty Proceedings

- *SEC v. Jarkesy* (2024): The Seventh Amendment guarantees a jury trial where a federal agency brings seeks a civil monetary penalty as such claims are “legal in nature” (rather than equitable) and implicate “private” rather than “public rights”

FEDERAL LANDSCAPE: CHANGES IN COURTS

Critics have stopped calling the 9th Circuit the 9th “Circus”



9th Circuit Court of Appeals (CA, OR, WA, ID, MT, NV, AZ, AK, HI)

- 16 Dem appointees; 13 Rep appointees (10 by DJT); no vacancies

FEDERAL LANDSCAPE: CHANGES IN COURTS

U.S. District Court for the Northern District of California: 14 Dem appointees; no vacancies

U.S. District Court for the Eastern District of California: 6 Dem appointees; no vacancies

Senior Status Rescissions/Delays?

Other Circuits:

- 5th Circuit: 5 Dem appointees; 12 Rep appointees; no vacancies
- 1st Circuit: 6 Dem appointees; 0 Rep appointees; 1 vacancy
- 4th Circuit: 8 Dem appointees; 7 Rep appointees; no vacancies

FEDERAL LANDSCAPE: CHANGES IN ADMINISTRATION

- **Department of Government Efficiency (DOGE) [E.O. 14158 (Jan. 20, 2025)]**
- **Office of Management and Budget**
- **Office of Personnel Policy**
- **Injunctions**



FEDERAL LANDSCAPE: CHANGES IN ADMINISTRATION

Executive Order No. 14154 Unleashing American Energy (Jan. 20, 2025)

- Requires all agency heads to review existing agency actions (regulations, etc.) that unduly burden development of domestic energy resources and with OMB develop a plan to suspend, revise, or rescind them.
- Requires rescission of CEQ NEPA regulations and issuance of NEPA guidance emphasizing efficiency and certainty.

Executive Order No. 14156 Declaring a National Energy Emergency (Jan. 20, 2025)

- Authorizes agency heads to use emergency authorities to expedite (non-renewable) energy infrastructure permitting under the Clean Water Act and Endangered Species Act, including convening the “God Squad.”

FEDERAL LANDSCAPE: CHANGES IN ADMINISTRATION

Presidential Memorandum Regulatory Freeze Pending Review (Jan. 20, 2025)

- No rule proposals to Federal Register
- Withdraw rules sent to Federal Register but not published
- Consider postponing for 60 days the effective date of any rules that have been published to allow for review and potential re-opening of public comment period

Executive Order No. 14181 Emergency Measures to Provide Water Resources in California and Improve Disaster Response in Certain Areas (Jan. 24, 2025)

- Sec. 2 (e) "The Secretary of the Interior [sic and Commerce?] shall promptly review, revise, or rescind any regulations or procedures specific to implementation of section 1536 of title 16 United States Code, as needed and consistent with applicable law, to conform with the plain meaning of the statute."

FEDERAL LANDSCAPE CHANGES IN ADMINISTRATION

- **DOI Secretarial Order No. 3418 Unleashing American Energy (Feb. 3, 2025)**
 - Revokes prior EOs (Sec. 3)
 - Directs Assistant Secretaries (Sec. 4) to submit within 15 days an Action Plan that:
 - Includes appropriate steps to suspend, revise, or rescind regulations, and other regulatory documents, including:
 - Three ESA Rules Revisions (Apr. 5, 2024)
 - Section 7 consultation
 - Section 4 listing and CH designation
 - Blanket 4(d) rule
 - M Opinion (Mar. 8, 2021) re MBTA Does Not Prohibit Incidental Take and MBTA ITP Regulation (Oct. 4, 2021)
 - Includes actions to review and revise CH designations considering BAS, economic and national security impacts, and the Secretary's statutory authority to exclude areas per Section 4(b)(2)

ESA RULES LITIGATION: 2019-2023

- Challenge to 2019 ESA Rules by CBD et al - N.D. Cal.
 - Blanket 4(d) Rule
 - Section 4 Listing and CH Designation Rule
 - Section 7 Rule
- “Blue” and “Red” State Suits
- National Trade Associations Intervention (incl. FFRC and NAFO)
- Judge Tigar Order Remanding and Vacating Rules (July 2022)
- Ninth Circuit “Reversal” (Sept. 2022)
- Judge Tigar Order Remanding without Vacatur - 2019 ESA Rules Reinstated (Nov. 2022)

ESA RULES LITIGATION: 2024 RULES REVISIONS

2024 ESA Rules Revisions (Apr. 2024)

- Blanket 4(d) Rule
 - Rescinded
- Section 4 Listing and CH Designation Rule
 - “Foreseeable future”
 - No consideration of economic impacts
 - Unoccupied CH (revoked “reasonable certainty” to contribute to conservation and to contain essential feature; designate all occupied CH first contra *Weyerhaeuser*)
- Section 7 Rule
 - “Mitigation” in section 7 and “offsets” (incl. off-site)

ESA RULES LITIGATION: 2024 ENGO CHALLENGE

CBD, Sierra Club, and WildEarth Guardians – Filed again in ND Cal. (Aug. 2024)

- Challenge to 2019 and 2024 Revisions (not Blanket 4(d) Rule rescission)
 - “Foreseeable future,” de-listing, CH designation (not prudent)
 - Various section 7 tweaks, incl. CH ad mod (“as a whole”) and section 7 off-site “mitigation”
- Plaintiffs successfully “related” case to Judge Tigar
- No “Blue” or “Red” state suit
- Plaintiffs’ MSJ due 3/14/25; expect DOJ to request extension (or stay)

ESA RULES LITIGATION: 2024 INDUSTRY CHALLENGE

National Hydropower Association – Filed in D.D.C. (Aug. 2024)

- Challenge to 2024 Section 7 Rule revision authorizing “mitigation” and “offsets” (incl. off-site) RPMs
 - Admitted reversal of historic position/interpretation
 - Section 7 text vs. Section 10 text:
 - RPMs are “measures ... necessary or appropriate to minimize such impact”
 - HCP must specify “what steps the applicant will take to minimize and mitigate such impacts”
 - Legislative History
 - HCP and Consultation Handbooks and administrative practice
- Court granted DOJ’s motion to extend MSJ briefing schedule (per 2/4 Order) from 2/4 to 3/14 so incoming officials at the Services have “time to become familiar with the final rules and the issues presented by th[e] litigation and to determine how they wish to proceed.”
- Plaintiffs nevertheless filed their MSJ per the original schedule, on 2/4

BARRED OWL MANAGEMENT STRATEGY LITIGATION

Animal Wellness Action and The Center for a Humane Society – Filed in W.D. Wash. (Oct. 2024)

Themes and Claims:

- “[A] federal effort to determine the evolutionary paths of species to a degree never seen before in American wildlife management.”
- BaOw is not “invasive”
- Focus should be on loss of old growth habitat
- MBTA Special Purpose Permit (MBTA/APA)
 - Ultra vires of MBTA
 - Fails to show “compelling justification” required by regulation
 - Other failures to comply with regulation
- EIS (NEPA/APA) – Failures to: provide sufficient specificity re removal activities, take “hard look” at impacts, adequately assess alternatives, meet project purpose and need

BARRED OWL MANAGEMENT STRATEGY LITIGATION

Friends of Animals – Filed in D. Or. (Nov. 2024)

Themes and Claims:

- “Barred owls are the target – and they are the scapegoat for FWS’s mismanagement and unwillingness to better protect spotted owl habitat.”
- “Mass slaughter” of 450,00 owls over 30 years
- Not “invasive” and focus should be on loss of old growth habitat
- MBTA/APA and NEPA/APA
- Wilderness Act/APA
 - intentionally alters wilderness character of wilderness areas
 - autonomous recording units are prohibited “structures or installations”
 - Act’s special provision for activities “as may be necessary in the control of fire, insects, and diseases” does not include birds

BARRED OWL MANAGEMENT STRATEGY LITIGATION

Defendant Intervenors in Both Cases

- Filed January 20, 2025
- Environmental Protection Information Center (EPIC), Klamath-Siskiyou Wildlands Center, Umpqua Watersheds, Conservation Northwest, Marin Audubon Society
- “In this case, Applicants seek to support the FWS’s decision to further the conservation of the northern spotted owl by controlling populations of the barred owl, an invasive species that imperils the continued existence of the northern spotted owl.”
- “Given that this lawsuit comes at a time of a presidential administration transition, particularly to a Defendant President and federal agency leadership that did not participate in the decision at issue, there will not be a consistent, northern spotted owl-focused party present in this case at all times to protect Applicants’ interests unless the Applicants themselves are allowed to intervene.”

CALIFORNIA LANDSCAPE: CHANGES

- 2024 Election
- Resistance 2.0?
- Los Angeles Wildfires – EOs re CEQA and CCC and other laws for rebuilding
- Water Supply Orders
- Permitting and CEQA Reform
- CESA Reform

CESA – CAN TRAINWRECKS BE AVOIDED?

Listing Process:

Two Steps

- Step One: Punchlist – Candidacy (with take prohibition)
- Step Two: Listing is warranted determination

Petitions and Listings:

- Western Joshua Tree
- Bumble Bees
- Burrowing Owl

Legislative Reform?

WESTERN JOSHUA TREE

- Candidacy (Sept. 2020)
- 2084 Rules (Fall 2020)
- Western Joshua Tree Conservation Act (SB 122; July 2023)
 - Permits
 - Fees for Mitigation
 - APA exemption for Relocation Guidelines and Protocols
 - Western Joshua Tree Conservation Plan
 - Updated Status Review to FFG no later than Jan. 1, 2033
- CDFW has issued ITPs and WJTCA permits
- Implementation Challenges



Image Source: CDFW

BUMBLE BEES

3rd DCA rules insects fit within the definition of “fish” (May 2022)

- Today in California Legal News, Some Bees Are Now Fish (*Los Angeles Magazine*): “The ruling is intended to protect our pollinating insect friends, not to rock your world culturally, so calm down.”

Information to CDFW re Status Review due Jan. 23, 2023

Status Review overdue

CDFW has issued ITPs

Implementation Challenges



BURROWING OWL

Candidate (Oct. 2024)

Information to CDFW re Status Review ends Feb. 15, 2025

Status Review due Oct. 2025

CDFW has issued ITPs

Implementation Challenges



Image Source: CDFW

OUTLOOK FOR CALIFORNIA INDUSTRY

- Stability Through the Turbulence?
- Conservation Science
- Wildfire Management
- FESA 4(d) Rules and Cooperative Agreements
- CESA Consistency Determinations and SHAs
- CEQA Cumulative Impacts and Alternatives





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Calforests | FSI 2025 Legal Update

Federal Income Tax Implications | CAL FIRE Grant Funded Pre-Fire Hazardous
Fuel Reduction Activities

Issue Presented and Short Answer



- Issue Presented: what are the federal income tax implications for landowners that receive CAL FIRE grant funding or grant-funded services for pre-fire hazardous fuel reduction activities on their lands?
- Short Answer: the federal income tax implications are uncertain. The receipt of CAL FIRE grant funding or grant-funded services may meet the definition of “gross income” under the Internal Revenue Code (IRC) but may also be excludable (at least in part) from gross income under IRC Section 126, subject to certain recapture provisions in IRC Section 1255.

IRC Section 61 – “Gross Income”



- IRC Section 61: defines “gross income” as “all income from whatever source derived.”
 - Congress intends to tax all gains or undeniable accessions to wealth, clearly realized, over which taxpayers have complete dominion. Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955).
- Gross income includes not only cash payments but can also include the value of property or services received.

Key Questions



- Does a landowner's receipt of CAL FIRE grant funding or grant-funded services for pre-fire hazardous fuel reduction activities on their lands constitute gross income for federal income tax purposes?
- If so, is the gross income taxable under the IRC?
 - The answer is 'it depends'.

IRC Section 126 – Certain cost-sharing payments excludable from gross income



- IRC Section 126: gross income does not include the “excludable portion” of payments received under
 - certain federal conservation programs; or
 - state programs under which payments are made “primarily for the purpose of conserving soil, protecting or restoring the environment, improving forests, or providing a habitat for wildlife.”
 - Secretary of Agriculture makes the determination of what portion of payment is excludable
 - Secretary of Treasury must also determine that the payment does not increase “substantially the annual income derived from the property.”

IRC Section 1255 – Gain from disposition of Section 126 property



- IRC Section 1255: certain amounts excluded from gross income under Section 126 must be recaptured as ordinary income if there is a disposition of the property or improvement purchased or acquired within a 20-year period, absent certain exceptions relating to gifts, death, and tax free reorganizations.

Conclusion



- The federal income tax implications are not certain for landowners that receive CAL FIRE grant funding or grant-funded services for pre-fire hazardous fuel reduction activities on their lands.
- There is some landowner interest in amending the IRC to provide more clarity to landowners regarding the federal income taxability of CAL FIRE grant funding or grant-funded services for pre-fire hazardous fuel reduction activities on their lands.



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