

Comments

Splitting the Ninth Circuit: An Administrative Necessity or Environmental Gerrymandering?

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I. Introduction

The debate to divide the Ninth Circuit Court of Appeals (the “Ninth Circuit” or the “Circuit”) is not a new one. Indeed, the debate has raged for decades.¹ Nonetheless, the Ninth Circuit split debate continues and is just as heated today as at any point in history. Split proponents and opponents alike vehemently defend their positions, well aware that such a split could substantially change the judicial atmosphere in the western United States.² Although no such split has yet occurred, many

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1. See Jonathan D. Glater, *Lawmakers Trying Again to Divide Ninth Circuit*, N.Y. TIMES, June 19, 2005, at 16 (2005 WLNR 9698578).

2. See generally Jennifer E. Spreng, *The Icebox Cometh: A Former Clerk’s View of the Proposed Ninth Circuit Split*, 73 WASH. L. REV. 875 (1998) (advocating in favor of the split). But see generally Aaron H. Caplan, *Malthus and the Court of Appeals*:

proponents believe that a split is inevitable.³ Splitting the Circuit could have a lasting impact on former Ninth Circuit jurisprudence. A rearrangement of states within the Circuit and the creation of a new Twelfth Circuit could potentially isolate California, prompting accusations from opponents that these are merely attempts at “dividing and conquering” the Ninth Circuit in an effort to manipulate the pool of judges deciding certain cases and force a more favorable opinion.⁴

The Ninth Circuit Court of Appeals is by far the largest Court of Appeals in the United States, both in terms of size and population.⁵ Currently, the Ninth Circuit is comprised of nine states and two U.S. territories including Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington.⁶ Moreover, the Ninth Circuit hears roughly one-third of the entire federal judicial caseload.⁷ As a result, an ongoing effort is underway to split the Ninth Circuit in an apparent attempt to reduce the heavy caseload and other administrative burdens that accompany it.⁸ While proponents of the split are numerous,⁹ opponents have thus far prevented any division.¹⁰ Some of the stiffest opposition has come from environmental organizations that criticize the split as an attempt to gerrymander our judicial borders.¹¹ Environmental gerrymandering, loosely defined, involves drawing judicial boundaries in an attempt to manipulate the pool of judges deciding certain cases in hopes of obtaining a more favorable opinion.¹² Opponents claim that a Ninth Circuit split will isolate California and the so-called “liberal” decisions issued by that state, thereby relieving other states of their duty to follow those

Another Former Clerk Looks at the Proposed Ninth Circuit Split, 73 WASH. L. REV. 957 (1998) (advocating against the Ninth Circuit Split proposals).

3. Glater, *supra* note 1.

4. See Letter from Dan Ritzman et al., Executive Director, Alaska Coalition, to U.S. Senators (Sept. 18, 2006), <http://www.judgingtheenvironment.org/library/letters/9th-Circuit-split-Group-opposition-LTR-Sept-18-2006.pdf> [hereinafter Letter].

5. See Crystal Marchesoni, Comment, “*United We Stand, Divided We Fall?*”: *The Controversy Surrounding A Possible Division of The United States Court of Appeals for the Ninth Circuit*, 37 TEX. TECH. L. REV. 1263, 1264 (2005).

6. See COMM’N ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, FINAL REPORT 30 (1998), <http://www.library.unt.edu/gpo/csafca/final/appstruc.pdf> [hereinafter COMM’N].

7. Carl Tobias, *Without a Strong Case of Their Own, Supporters of the 9th Circuit Split Should Defer to Judges Who Oppose Division*, LEGAL TIMES, Aug. 28, 2006 at 60.

8. See Glater, *supra* note 1.

9. See *id.* (citing Republican lawmakers including Senator John Ensign (R-NV), Senator Lisa Murkowski (R-AK), and Representative F. James Sensenbrenner Jr. (R-WI) as proponents of the split).

10. See Marchesoni, *supra* note 5, at 1264.

11. See Tobias, *supra* note 7, at 60.

12. See Letter, *supra* note 4.

decisions.¹³

Although previously unsuccessful, proponents of the split are continuously introducing legislation that would facilitate the division of the Ninth Circuit.¹⁴ The purpose of this Comment is to explore the various split proposals and analyze the extent to which such proposals, if successful, would affect current jurisprudence. Specifically, this Comment will examine environmental case law emanating from the Ninth Circuit and will then analyze how the various split proposals will affect environmental laws and regulations in the West. Part II of this Comment provides a brief history of the debate, including arguments both for and against the split proposals. Part II will also introduce the various split proposals and will explore major environmental cases decided by the Ninth Circuit. Part III will analyze the different proposals' impacts on administrative burdens and on environmental case law and will discuss the resultant environmental consequences of a circuit split. Lastly, Part IV draws conclusions from the analysis.

II. Background

A. *Proponents of the Split*

The main thrust of the arguments in favor of splitting the Ninth Circuit centers around the Circuit's large geographic size and burgeoning population and caseload.¹⁵ Historically, attempts to split the Ninth Circuit can be traced to the 1940s, when states on the periphery of the Circuit, namely Hawaii, Alaska, and Pacific Northwest states, began to desire greater autonomy from increasingly influential appellate decisions from California.¹⁶ Even then, the population of the Ninth Circuit was much smaller compared to today.¹⁷ Due to an abundance of open land and natural resources, the population of the Ninth Circuit grew, transforming it from a once barren area into an area boasting a population of forty-four million people, which is twice the size of all other circuits but one.¹⁸

Commensurate with its size, the Ninth Circuit also has a larger caseload than any other circuit—about forty percent more than all other

13. John C. Yoo & Eric M. George, *Splitting the U.S. Court of Appeals for the 9th Circuit: A Flawed Plan to Isolate California*, SAN FRANCISCO CHRONICLE, Nov. 23, 2005 at B9.

14. Marchesoni, *supra* note 5, at 1275.

15. *See id.* at 1281-82.

16. *See id.* at 1274.

17. *See* Spreng, *supra* note 2, at 894.

18. *See id.*

circuits.¹⁹ This enormous case load is causing efficiency problems.²⁰ A former chief judge in the Ninth Circuit admitted that it takes the Circuit nearly four months longer than the national median to complete an appeal.²¹ The overwhelming caseload also makes it difficult for judges to dedicate an appropriate amount of time to their work.²² According to Senator Ensign of Nevada, the work load is just “too large and too unwieldy.”²³

In addition to the overwhelming caseload, proponents of the split also note that the geographic size of the Ninth Circuit imposes a significant travel burden on already overworked judges.²⁴ It is not uncommon for a judge to be required to travel to Hawaii, Alaska, Guam, or the Northern Mariana Islands.²⁵ A split, it is argued, will reduce travel time and expense, thereby increasing the operational efficiency of the Circuit.²⁶

Finally, proponents of the split often point to the high rate of reversal of Ninth Circuit decisions by the United States Supreme Court.²⁷ Between February 2004 and February 2005, about seventy-seven percent of all Ninth Circuit decisions were overturned.²⁸ Split proponents assert that the creation of a smaller circuit with a more limited number of judges will result in enhanced communication, interaction, and collegiality.²⁹ This, in turn, will produce a more consistent understanding of the law and, therefore, more consistent rulings.³⁰ If the Court can speak with one consistent and authoritative voice, the theory suggests that increasingly consistent decisions will follow and the reversal rate will subsequently diminish.³¹

These rationales are not exhaustive. Some proponents are inconspicuously seeking a split in an attempt to reduce the impact and flow of “liberal” decisions from the Ninth Circuit.³² Cases involving issues such as timber harvests in the Northwest, fishing rights in Alaska,

19. See Marchesoni, *supra* note 5, at 1282.

20. See *id.*

21. See *id.*

22. See Spreng, *supra* note 2, at 894.

23. Glater, *supra* note 1.

24. See Marchesoni, *supra* note 5, at 1281-82.

25. See *id.*

26. See Spreng, *supra* note 2, at 903; see also Marchesoni, *supra* note 5, at 1280.

27. See Marchesoni, *supra* note 5, at 1283.

28. See *id.*

29. See *id.*

30. See *id.*

31. See *id.* at 1282.

32. Howard Mintz, *GOP Closer to Splitting up Left-leaning 9th Circuit Appeals Court*, THE SEATTLE TIMES, Nov. 8, 2005.

and the death penalty in California have angered many conservatives.³³ The Ninth Circuit recently decided that the government likely lacked the power to ban medical use of marijuana.³⁴ The Ninth Circuit also declared the Pledge of Allegiance unconstitutional because it contained the words “under God.”³⁵ While many caution that ideological arguments are neither sufficient nor desirable reasons for splitting the Circuit,³⁶ they nonetheless cannot be overlooked.

B. Opposition to the Split

Opponents to the split proposals believe that splitting the Ninth Circuit will not result in the predicted benefits.³⁷ Proponents believe that the heavy caseload leads to far too many en banc decisions, which in turn significantly increases the workload of already overworked judges.³⁸ Opponents counter this point by noting that en banc decisions do not increase the workload of a judge who is not interested in the case; the judge can simply stay above the fray and then vote against hearing the case en banc.³⁹ Furthermore, no written opinion is necessary in such cases.⁴⁰ If a judge votes in favor of hearing a case en banc, then the case is sufficiently important to merit further review.⁴¹ In that situation, judges have an opportunity to familiarize themselves with each other, which counters the proponent’s argument that there is insufficient opportunity to do so.⁴² In other words, reducing en banc proceedings may reduce the level of collegiality desired by proponents of the split,⁴³ making their argument for less en banc decisions self-defeating.

To further their point, opponents to the split say that the split proposals will not significantly reduce judges’ workloads.⁴⁴ For example, one proposal leaves California, Hawaii, Guam and the Northern

33. *Id.*

34. *See* Raich v. Ashcroft, 352 F.3d 1222 (9th Cir. 2003), *rev’d*, Gonzales v. Raich, 545 U.S. 1 (2005).

35. *See* Newdow v. U.S. Cong. 292 F.3d 597 (9th Cir. 2002), *rev’d*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

36. *See* Tobias, *supra* note 7, at 60 (citing to the White Commission’s emphatic rejection of dividing the court for ideological reasons and further noting that proponents have used administrative rather than ideological arguments to justify a split, a possible admission of the weaknesses of the ideological argument).

37. *See* Aaron H. Caplan, *Malthus and the Court of Appeals: Another Former Clerk Looks at the Proposed Ninth Circuit Split*, 73 WASH. L. REV 957, 971 (1998).

38. *See* Spreng, *supra* note 2, at 896-97.

39. *See* Caplan, *supra* note 37, at 974.

40. *See id.* at 973.

41. *See id.* at 274.

42. *See id.*

43. *See id.*

44. *See* Tobias, *supra* note 7, at 60.

Mariana Islands in the Ninth Circuit.⁴⁵ Under this proposal, the new Ninth Circuit will still have a caseload of over 500 cases annually, which is above the national average.⁴⁶ Other opponents argue that the Ninth Circuit is not overwhelmed⁴⁷ and that current administrative procedures⁴⁸ are adequate to deal with the existing caseload.⁴⁹

Opponents further assert that a split, which would create an additional Twelfth Circuit, is undesirable because it prevents uniformity.⁵⁰ Most split proposals involve isolating California, which would leave the west coast divided into two different jurisdictions.⁵¹ Additionally, opponents argue that a larger circuit is beneficial because judges will have the opportunity to hear a more diverse caseload, which increases the likelihood that a judge will have had some prior exposure to any type of case.⁵² The resultant knowledge, in turn, may increase a litigant's respect for a judge's ruling.⁵³ A smaller circuit will lead to an unvaried caseload and therefore less knowledgeable judges.⁵⁴

Finally, and most pertinent to this Comment, environmentalists oppose efforts to split the Circuit and assert that efforts to do so are merely attempts at environmental gerrymandering.⁵⁵ Because the Ninth Circuit contains many public lands, the court receives a large number of environmental cases regarding land use and management issues, as well as environmental preservation and protection issues.⁵⁶ For example, the court blocked sales of old-growth forests to protect the endangered northern spotted owl,⁵⁷ upheld the right to citizen suits under the Clean

45. *See id.*

46. *See id.* (The remaining states will comprise the new Twelfth Circuit which will handle only 317 cases per year, a number far below the national average. This demonstrates the imbalance created by such a split and the split's ineffectiveness on reducing Ninth Circuit caseload.)

47. *See* Glater, *supra* note 1.

48. *See infra* note 181.

49. *See* Diarmuid F. O'Scannlain, *A Ninth Circuit Split Study Commission: Now What?*, 57 MONT. L. REV. 313, 314 (1996).

50. *See* Caplan, *supra* note 37, at 974.

51. *See* Ninth Circuit Court of Appeals Reorganization Act, S. 562, 108th Cong. (2003); Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2003, H.R. 2723, 108th Cong. (2003); Ninth Circuit Judgeship and Reorganization Act of 2004, S. 878, 108th Cong. (2004); The Circuit Court of Appeals Restructuring and Modernization Act of 2005, S. 1845, 109th Cong. (2005).

52. *See* Caplan, *supra* note 37, at 969.

53. *See id.* at 974.

54. *See id.*

55. *See* Letter, *supra* note 4 (citing to Pete Wilson's condemnation of the split as an attempt to environmental gerrymander).

56. *See* Paul Rauber, *Frontier Justice: Western Republicans Seek a New Court of, and for the Cowboys*, SIERRA, Jan.-Feb. 1998, at 18.

57. *See infra* Part II-D-(1) and note 108.

Water Act,⁵⁸ and voided over one hundred grazing leases on national forests.⁵⁹ As a result of these pro-environment decisions, environmentalists charge that proponents of the split are incorrectly labeling the court as an activist court.⁶⁰ Moreover, they assert that splitting the Circuit will allow litigants and anti-environmental groups in particular to “judge-shop” and seek a venue that is more likely to be sympathetic to their cause.⁶¹ By changing the pool of judges who decided these cases and by fragmenting the western U.S. into different circuits, the consistency of caselaw will be reduced.⁶² Environmental groups charge that this will “fracture the management of natural resources in the Pacific Ocean and numerous special places in western states, and leave them vulnerable to greater exploitation and mismanagement.”⁶³ Proponents of the split, such as former Montana Senator Conrad Burns, discredit these charges and point instead to the burgeoning population and caseload as reasons for the split.⁶⁴ To date, all efforts to split the Ninth Circuit have been unsuccessful. The following section will explore some of the more prominent recent attempts to split the Circuit.

C. *Split Proposals*

The earliest attempts to split the Ninth Circuit date back to 1891.⁶⁵ Although many attempts and proposals have been offered, it is unfeasible and unnecessary to consider each proposal. Rather, below are the most recent and most prominent proposals to split the Circuit.

1. Senate Bill 562

In 2003, Senator Murkowski of Alaska introduced Senate Bill 562, commonly cited as the Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2003.⁶⁶ This bill proposed the creation of a new Twelfth Circuit consisting of Alaska, Arizona, Guam, Hawaii, Idaho, Montana, Northern Mariana Islands, Oregon, and Washington, while leaving California and Nevada in the Ninth Circuit.⁶⁷ On April 7, 2004,

58. *See infra* Part II-D-(3) and note 120.

59. *See* Rauber, *supra* note 56, at 18.

60. *See id.*

61. *See* Letter, *supra* note 4.

62. *See id.*

63. *Id.*

64. *See* Rauber, *supra* note 56, at 18.

65. *See* COMM’N, *supra* note 6, at 33.

66. Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2003, S. 562, 108th Cong. (2003).

67. *Id.*

the bill was referred to the Senate's Committee on the Judiciary's Subcommittee on Administrative Oversight.⁶⁸ Since that hearing, there has been no subsequent major action.⁶⁹

2. House Bill 2723

Representative Michael Simpson of Idaho introduced House Bill 2723, which is in essence S. 562's counterpart in the House of Representatives.⁷⁰ Much like S. 562, H.R. 2723 seeks to divide the Ninth Circuit into two circuits, but in a slightly different manner.⁷¹ Under this proposal, Arizona, California, and Nevada will remain in the Ninth Circuit while Alaska, Guam, Hawaii, Idaho, Montana, the Northern Mariana Islands, Oregon, and Washington will comprise a new Twelfth Circuit.⁷² The last major action on this bill occurred on October 27, 2003, when the Subcommittee on Courts, the Internet, and Intellectual Property held a hearing on the merits of the bill.⁷³

3. Senate Bill 878

Section 6 of Senate Bill 878, also known as the Ninth Circuit Judgeship and Reorganization Act of 2004, proposes the creation of two new circuits, a Twelfth Circuit consisting of Arizona, Nevada, Idaho and Montana, and a Thirteenth Circuit consisting of Alaska, Oregon, and Washington.⁷⁴ California, Guam, Hawaii, and the Northern Mariana Islands would remain in the Ninth Circuit.⁷⁵

4. Senate Bill 1845

On October 6, 2005, Senators Murkowski and Ensign introduced The Circuit Court of Appeals Restructuring and Modernization Act of 2005. This Act, like S. 878, proposed splitting the Ninth Circuit into two circuits, with California, Guam, Hawaii, and the Northern Mariana Islands remaining in the Ninth Circuit while Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington would constitute a new

68. *Id.* (referencing Bill Summary and Status).

69. *Id.* (referencing Bill Summary and Status).

70. Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2003, H.R. 2723, 108th Cong. (2003).

71. *Id.*

72. *Id.*

73. *Id.* (referencing Bill Summary and Status).

74. Ninth Circuit Judgeship and Reorganization Act of 2004, S. 878, 108th Cong. § 6 (2004).

75. *Id.*

Twelfth Circuit.⁷⁶ On November 26, 2005, the Judiciary Subcommittee on Administrative Oversight and the Courts held hearings.⁷⁷ There has been no major subsequent action on this bill.⁷⁸

5. The Commission on Structural Alternatives for the Federal Courts of Appeals

On December 18, 1998, the Commission on Structural Alternatives for the Federal Courts of Appeals released its final report that included its recommendations for restructuring the Ninth Circuit.⁷⁹ Unlike nearly all the other proposals, the commission did not endorse splitting the Ninth Circuit into smaller circuits.⁸⁰ Rather, the commission recommended that the Circuit be divided into three divisions: a Northern Division including Alaska, Idaho, Montana, Oregon, and Washington; a Middle Division including northern and eastern California, Guam, Hawaii, Nevada, and the Northern Mariana Islands; and a Southern Division, including Arizona and central and southern California.⁸¹

Under this proposal, each division would function as a semi-autonomous unit.⁸² The commission reasons that by having seven to eleven judges serving together in each division for extended periods of time, the problem of inconsistent case law stemming from too many judges and a general lack of familiarity with each other is eliminated.⁸³ Collegiality, consistency, and coherence of case law will increase.⁸⁴ Additionally, the smaller decisional units will likely promote predictability and consistency by reducing a judge's workload, thereby allowing him or her the opportunity to carefully read the opinions of other judges within their division, a task which is now believed to be too daunting, given the size of the Circuit.⁸⁵

The report discourages splitting the court for a variety of reasons.⁸⁶ First, such a split would "deprive the west coast of a mechanism for

76. The Circuit Court of Appeals Restructuring and Modernization Act of 2005, S. 1845, 109th Cong. (2005).

77. *Id.*

78. *Id.* (referencing Bill Summary and Status).

79. See COMM'N, *supra* note 6. The Commission was created in the wake of the controversy regarding the Ninth Circuit's ability to function efficiently in light of its growing size. The Commission was directed to make recommendations to the President and Congress regarding potential changes in circuit boundaries as well as circuit structure. *Id.* at ix. Pub. L. No. 105-119 authorized the Commission.

80. See *id.* at x.

81. See *id.* at 41.

82. See *id.* at 43.

83. See *id.* at 47.

84. See *id.* at 48.

85. See *id.*

86. See *id.* at 52-53.

obtaining a consistent body of federal appellate law, and of the practical advantages of the Ninth Circuit administrative structure.”⁸⁷ Additionally, the commission asserts that in order to split the Circuit in a manner that results in an equitable division of caseload and appeals heard per judge, it is necessary to split California between two judicial circuits,⁸⁸ an event which may have undesirable consequences.⁸⁹ Although splitting one state between two appellate circuits has its share of critics, several Supreme Court justices have suggested that it can be done.⁹⁰

6. Other Proposals

Aside from the major proposals listed above, other alternatives have also been considered over the years. One such approach, the “Icebox” approach, proposes to divide the Ninth Circuit into a new Twelfth Circuit consisting of the northern states of Alaska, Idaho, Montana, Oregon, and Washington while California, Guam, Hawaii, the Northern Mariana Islands, and Nevada remain in the Ninth Circuit.⁹¹ Although some have argued that this proposal will help reduce the caseload⁹² and increase legal consistency,⁹³ others have criticized it on grounds that the new “Icebox” circuit would be dominated by certain categories of cases perhaps giving rise to the nickname “Timber, Salmon, and Tribal Lands Circuit” (much like the Fifth Circuit has been dubbed the “Oil and Gas Circuit”).⁹⁴ This lack of diversity will reduce an appellate judge’s diversity of knowledge which may lead to decreased respect for a judge’s ruling.⁹⁵

Another proposal is the “horsecollar” approach, which seeks to retain only California in the Ninth Circuit.⁹⁶ All the other states of the former Ninth Circuit will comprise a new Twelfth Circuit.⁹⁷

Finally, in 1973, the Commission on Revision of the Federal Court Appellate System (“Hruska Commission”) concluded that the best way to equalize caseloads is to split not only the Ninth Circuit, but also the

87. *See id.* at 52.

88. *Id.*

89. *See infra* note 175.

90. COMM’N, *supra* note 6, at 57 (citing Justice Scalia’s assertion that the Supreme Court could deal with such intercircuit challenges as well as Justice Steven’s assertion that concerns over the split were “seriously exaggerated.”).

91. *See* O’Scannlain, *supra* note 49, at 321.

92. *See* Spreng, *supra* note 2, at 893-96.

93. *See id.* at 905-08.

94. *See* Caplan, *supra* note 37, at 968.

95. *See id.* at 969.

96. *See* O’Scannlain, *supra* note 49, at 321.

97. *See id.*

state of California, into two.⁹⁸ This gives rise to issues and criticisms similar to those under the Commission on Structural Alternatives for the Federal Courts of Appeals' proposal.⁹⁹

D. Environmental Jurisprudence from the Ninth Circuit

Federal and public lands are numerous in the western United States.¹⁰⁰ Timber and cattle industries also thrive in this region.¹⁰¹ Additionally, large tracts of natural lands, many of which are home to rare species, are found in these states.¹⁰² As a result of these economic, public, and natural occurrences, the Ninth Circuit hears numerous environmental cases.¹⁰³ In hearing these cases, the Ninth Circuit necessarily considers both environmental and economic concerns, two factors which are frequently contradictory and sometimes mutually exclusive. Many of the decisions in the Ninth Circuit have been decisively pro-environment.¹⁰⁴ For example, the Ninth Circuit blocked timber sales in old-growth forests in the Northwest, a critical habitat to the endangered northern spotted owl.¹⁰⁵ The court also restricted grazing rights in areas of the Southwest that are habitat to endangered fish species.¹⁰⁶ As a result of these numerous environmental decisions, some have come to regard the Ninth Circuit as the most important court in the nation with regard to environmental protection cases.¹⁰⁷ It is therefore critical to determine how a circuit split, if it should come to fruition, will affect these critical decisions. The purpose of this section is to highlight a few of the many prominent environmental cases that have recently been decided by the Ninth Circuit.

1. *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*¹⁰⁸

This recent decision is among the most controversial environmental

98. See COMM'N, *supra* note 6, at 33.

99. See *supra* notes 90 and 175 and accompanying text.

100. See Rauber, *supra* note 56.

101. *Id.*

102. See *The Ninth Circuit and William G. Myers*, Economics for the Earth, A Friends of the Earth Publication, Jan. 2004, <http://www.foe.org/camps/eco/interior/ninthcircuit.pdf>.

103. See Rauber, *supra* note 56.

104. See *id.*

105. See *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059 (9th Cir. 2004).

106. See *Southwest Ctr. for Biological Diversity v. U.S. Forest Serv.*, 307 F.3d 964 (9th Cir. 2002), *vacated as moot*, 355 F.3d 1203 (9th Cir. 2004).

107. See *The Ninth Circuit and William G. Myers*, *supra* note 102.

108. 378 F.3d 1059 (9th Cir. 2004).

rulings issued by the Ninth Circuit. In this case, the Ninth Circuit found that the U.S. Fish and Wildlife Service's definition of "adverse modification"¹⁰⁹ afforded too little protection to areas designated as critical habitat.¹¹⁰ As a result, the court overturned six biological opinions issued by the Service that permitted timber harvest within areas designated as critical habitat for the spotted owl.¹¹¹

This decision has angered many lawmakers, particularly in the Northwest.¹¹² One newspaper reported "deep dissatisfaction" with the court regarding "major decisions concerning logging of old growth forests. . . ."¹¹³ One senator from Oregon was "'deeply upset' by decisions 'restricting logging on federal forest lands.'"¹¹⁴ Such divisive decisions are the catalyst for proposals to split the Circuit.

2. *Blue Mountains Biodiversity Project v. Blackwood*¹¹⁵

In this case, several environmental groups sought to enjoin timber salvage sales in the Umatilla National Forest.¹¹⁶ This land contains the North Fork of the John Day River, home to the largest spawning population of summer salmon and wild chinook salmon.¹¹⁷ The environmental groups claimed that the Forest Service failed to comply procedurally with the National Environmental Policy Act (NEPA).¹¹⁸ The Ninth Circuit reversed a district court ruling in favor of the Forest Service and held that the Forest Service was required to create an environmental impact statement that addressed the cumulative effects of the logging projects.¹¹⁹

3. *Northern Plains Resource Council v. Fidelity Exploration and*

109. The U.S. Fish and Wildlife Service defined "adverse modification" as a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. *Id.* at 1069. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical. *Id.*

110. *See id.*

111. *Id.* at 1077.

112. *See* John P. Frank, Senior Advisory Bd. of the Ninth Circuit, Statement Before the Commission on Structural Alternatives for the Federal Courts of Appeals (May 29, 1998).

113. *Id.* (quoting a report appearing in the PORTLAND OREGONIAN on January 26, 1989).

114. *Id.*

115. 161 F.3d 1208 (9th Cir. 1998).

116. *See id.*

117. *See id.* at 1210.

118. *See id.* at 1208.

119. *Id.*

*Development Company*¹²⁰

This case involved a citizen's suit filed pursuant to the Clean Water Act.¹²¹ The legal issue was whether groundwater derived from extraction of coal bed methane (CBM) is a "pollutant" under the Clean Water Act.¹²² The district court granted summary judgment for the company, but the Ninth Circuit reversed, holding that CBM groundwater was a "pollutant" under the Clean Water Act.¹²³ The court reasoned that although Fidelity did not add any chemicals to CBM water before discharge, the water was nonetheless laden with suspended solids and other "salty" minerals.¹²⁴ These solids and minerals were produced during the process of gas extraction and, when discharged, altered the quality of the nearby Tongue River.¹²⁵ The discharge was therefore subject to Clean Water Act regulations.

4. *Kootenai Tribe of Idaho v. Veneman*¹²⁶

Several recreational groups, as well as counties and tribes, challenged the U.S. Forest Service's roadless area conservation rule.¹²⁷ The rule was promulgated by the Clinton Administration in order to protect 58.5 million acres of national forest roadless areas from road building.¹²⁸ The district court suspended the roadless rule, but the Ninth Circuit reversed the injunction and reinstated the roadless rule.¹²⁹ In addition to finding that promulgation of the roadless rule fulfilled procedural requirements under NEPA, the court also reasoned that the hardships associated with the rule (e.g. difficulties in controlling fires, insect infestation and disease outbreaks due to a lack of roads)¹³⁰ did not outweigh the benefits, including the public's interest in precious and unreplaceable resources.¹³¹ The district court failed to account for the latter factor.¹³² This opinion is a decisively pro-environment decision because it announces a balancing test whereby environmental considerations, such as the public's interest in preserving natural

120. 325 F.3d 1155 (9th Cir. 2003).

121. *See id.*

122. *See id.*

123. *Id.*

124. *See id.* at 1158.

125. *See id.* at 1161-62.

126. 313 F.3d 1094 (9th Cir. 2002).

127. *See id.* at 1104.

128. *See id.* at 1105.

129. *See id.* at 1126.

130. *See id.* at 1124.

131. *See id.* at 1125.

132. *See id.*

resources, must be given fair consideration when balancing all the relevant factors.

5. *Carson Harbor Village v. Unocal Corporation*¹³³

This case involved a rehearing en banc of a previously decided decision by the Ninth Circuit.¹³⁴ The case concerned a mobile home park, owned by Carson Harbor, which was formerly leased by Unocal, a petroleum production company.¹³⁵ Testing of the property revealed elevated levels of petroleum substances and lead.¹³⁶ Carson Harbor sued Unocal under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) in hopes of recovering money from remedial damages and lost earnings.¹³⁷ A major issue was whether the petroleum substances were actively disposed of by Unocal, rendering them liable, or whether the substances merely passively migrated.¹³⁸ The first Ninth Circuit opinion found that disposal means were irrelevant; even passive migration would render Unocal liable.¹³⁹ This decision represented a stark contrast to previous jurisprudence on the matter. However, the en banc court later softened its position and held that prior landowners are not liable under CERCLA where only passive migration occurred.¹⁴⁰ The court reasoned that passive migration does not fulfill the definition of “disposal” within the meaning of CERCLA.¹⁴¹ However, the court emphasized that property owners will not be immune from liability in every instance where they did not purposefully direct the contamination.¹⁴² If, for example, leaky tanks go unfixed by a prior owner, that prior owner may still be liable, even though they did not actively dispose of the contamination.¹⁴³

133. 270 F.3d 863 (9th Cir. 2001).

134. *See id.*

135. *See id.* at 868.

136. *See id.*

137. *See id.* at 869.

138. *See id.* at 874-75.

139. 227 F.3d 1196 (9th Cir. 2000).

140. 270 F.3d 863, 880-81.

141. *Id.*

142. *Id.* at 881.

143. *See id.*

6. Other Cases and Upcoming Appeals to the U.S. Supreme Court¹⁴⁴

In the 2006 case *Pakoota v. Teck Cominco Metals, Ltd.*, the Ninth Circuit considered the liability of a Canadian smelter under CERCLA.¹⁴⁵ The court held that the operator of a Canadian smelter can be held liable under the federal law, because although the polluting emission originated in Canada, it traveled into the United States.¹⁴⁶ The court stressed, however, that *Pakoota* did not involve an extraterritorial application of the act because the locus of the actual or threatened release, not the locus of the operator's arranging for disposal of slag, is considered when determining the domestic or extraterritorial nature of the suit.¹⁴⁷ The plaintiffs subsequently announced that they intend to seek certiorari and it is expected that the Supreme Court will address any extraterritorial application of CERCLA at that point.¹⁴⁸

In *Southwest Center for Biological Diversity v. United States Forest Service*, the Ninth Circuit considered the adverse impacts of cattle grazing in habitat for the endangered loach minnow.¹⁴⁹ The Southwest Center sought an injunction to prevent cattle from grazing in the vicinity of the minnow's habitat.¹⁵⁰ Grazing adversely affects the minnow's habitat by removing vegetation which would otherwise stabilize soils and filter sediments from runoff.¹⁵¹ The district court denied the injunction, and the Southwest Center appealed to the Ninth Circuit, arguing that an injunction should be issued due to a procedural violation during the consultation period¹⁵² required under the Endangered Species Act.¹⁵³ The court held, however, that there was no procedural violation because the record did not demonstrate that the minnow were likely to be harmed

144. While the above section highlights a few of the major environmental cases from the Ninth Circuit, it is far from a comprehensive review of all Ninth Circuit environmental jurisprudence. While such a review is beyond the scope of this Comment, several other cases and upcoming appeals to the Supreme Court from the Ninth Circuit bare mentioning.

145. 452 F.3d 1066 (9th Cir. 2006).

146. *Id.* at 1074.

147. *Id.*

148. Steve Jones, *Environmental News: Supreme Court Docket Full of Environmental Cases*, Marten Law Group (2006), available at <http://www.martenlaw.com/news/?20061108-supreme-court-docket> (last visited Jan. 28, 2007).

149. 307 F.3d 964 (9th Cir. 2004).

150. *See id.* at 967.

151. *See id.* at 970.

152. The consultation period refers to either an informal consultation, or, if necessary, a formal consultation with either the Secretary of Interior or the Secretary of Commerce in order to determine whether the proposed action would likely impact endangered species or their critical habitat. *See id.* at 969.

153. *See id.* at 968.

during the consultation period.¹⁵⁴ Although this case was later dismissed as moot,¹⁵⁵ it is indicative of the tension between the grazing industry and endangered species in the western United States.

In addition to the above cases, there are numerous Ninth Circuit environmental cases currently on the Supreme Court docket. In *Ecology Center Inc. v. Austin*, the Court decided whether the Ninth Circuit failed to apply the proper standard under the Administrative Procedure Act when evaluating whether the U.S. Forest Service complied with the National Environmental Policy Act of 1969 (NEPA) and the National Forest Management Act of 1976.¹⁵⁶ In *San Luis Obispo Mothers for Peace v. NRC*, the Ninth Circuit issued an unprecedented opinion holding that NEPA requires an analysis of the environmental impacts of a potential terrorist attack.¹⁵⁷ Finally, in *U.S. Forest Service v. Earth Island Institute*, the Ninth Circuit issued a preliminary injunction barring the Forest Service from completing forest restoration projects.¹⁵⁸ All of the above cases represent influential and recent Ninth Circuit environmental rulings. This listing is by no means exhaustive, however, and is only intended to demonstrate the range and importance of environmental issues decided in the Ninth Circuit.

III. Analysis

At the time of this Comment, the Ninth Circuit remains in tact. Nevertheless, the debate is far from over. At the heart of the debate are the critical questions: Will splitting the Ninth Circuit be beneficial or detrimental, and, in either case, just how beneficial or detrimental will the split be? The answer to this question will undoubtedly vary depending on who you ask. Conservatives, generally, will respond that a split will be beneficial because it will create a Circuit comprised of judges who “would be more sensitive to how we manage our resources.”¹⁵⁹ Conversely, liberals¹⁶⁰ would counter that such a split is unnecessary and serves only to fractionalize our national judiciary.¹⁶¹ This section will examine these issues and, in ultimately concluding that

154. *Id.* at 973.

155. 355 F.3d 1203 (9th Cir. 2004).

156. 430 F.3d 1057 (9th Cir. 2005).

157. 449 F.3d 1016 (9th Cir. 2006), *petition for cert. filed* (U.S. Sept. 29, 2006) (No. 06-466).

158. 351 F.3d 1291 (9th Cir. 2006).

159. Neil A. Lewis, *Western Senators Are Pushing to Break Up Circuit Court*, N.Y. TIMES, Sept., 1 1997, at 12 (quoting Senator Conrad Burns, R-MT).

160. This term is used in a loose sense because many prominent Republicans, such as the former Republican governor of California, Pete Wilson, also oppose the split.

161. See Rauber, *supra* note 56 (quoting Senator Joseph Biden (D-DE) as saying “There is not a western Constitution. There is one Constitution.”).

a split would not be beneficial, will take a holistic approach by analyzing many variables from political influences to practicality to the current state of the economy and environment in the western United States. The analysis will raise several questions, first dealing with peripheral issues, including caseload reduction, and then will analyze the environmental questions surrounding the debate.

A. Does the Ninth Circuit Have Too Large a Caseload?

The Ninth Circuit currently has an undeniably large caseload. The caseload in the Ninth Circuit is approximately forty percent larger than that of the next circuit.¹⁶² In fact, the combined total cases, including cases commenced, terminated, or pending in the Ninth Circuit from March 31, 2003 to March 31, 2004 was 36,119, which amounts to twenty-seven percent of total number of cases brought in all circuits during the same period.¹⁶³ The Fifth Circuit, the next largest, had 21,599 cases commenced, terminated or pending during that same period.¹⁶⁴

B. Will Splitting the Ninth Circuit Substantially Reduce the Caseload?

Splitting the Ninth Circuit likely will not substantially reduce the Circuit's caseload under most of the proposed plans. For example, House Bill 2723,¹⁶⁵ also referred to as the "classic split,"¹⁶⁶ would not produce a substantial reduction in caseload in the Ninth Circuit. In fact, when taking into account increasing filing trends, the estimated per-judgeship filings in the proposed Ninth Circuit would actually increase from 226 per year to 257.¹⁶⁷ In the new Twelfth Circuit, however, per-judgeship filings would decrease from 226 to 169.¹⁶⁸

Senate Bill 878¹⁶⁹ does not fair much better. Under this proposal the new Ninth Circuit, including only California, Guam, Hawaii, and the Northern Mariana Islands, would still have a caseload of 500 cases annually, a number above the average.¹⁷⁰ The remaining states, comprising the new Twelfth Circuit would have a caseload of 317 per year, a number far below the national average.¹⁷¹

The only option that results in an equitable distribution of caseload

162. See Marchesoni, *supra* note 5, at 1281-82.

163. *Id.* at 1264.

164. *Id.*

165. See *supra* Part II-C-(2).

166. See COMM'N, *supra* note 6, at 54.

167. *Id.*

168. *Id.*

169. See *supra* Part II-C-(3).

170. See Tobias, *supra* note 7.

171. See *supra* note 46 and accompanying text.

is a plan considered by the Commission on Structural Alternatives for the Federal Court of Appeals.¹⁷² Under this proposal, California would be split between two circuits, a testament of California's burgeoning caseload.¹⁷³ The proposal would render weighted filings per judge at 232 in the Ninth Circuit, and about 219 in the Twelfth Circuit. Nevertheless, the thought of splitting one state between two circuits would almost certainly elicit strong objections, as was the case when the Hruska Commission¹⁷⁴ proposed such a split.¹⁷⁵

C. *Will Splitting the Circuit Substantially Reduce the Burden of Travel and Promote Collegiality?*

The answer to both questions is probably "no." No matter how you split the Circuit, substantial travel time will still be involved. For example, the "classic split," such as that proposed in House Bill 2723,¹⁷⁶ would still require traveling from Alaska to Idaho, or from Washington to Guam. That aside, traveling is much easier today than it was 1866 when the Ninth Circuit was first formed.¹⁷⁷ The advent of airplanes, interstates, and efficient automobiles arguably makes travel easier today than at any other point in the history of the Ninth Circuit.

A related issue is the lack of collegiality among judges in the Ninth Circuit. It is thought that this lack stems from there being "too many judges too far apart."¹⁷⁸ From this lack of collegiality, some argue that cohesiveness and consistency are reduced, rendering the Circuit internally inconsistent.¹⁷⁹ However, some analysts insist that these conflicts do not merit a split.¹⁸⁰ In fact, the Ninth Circuit has procedures

172. See *supra* Part II-C-(5).

173. Southern California will be grouped with Nevada, Arizona, Hawaii and the Northern Mariana Islands. Central and Northern California will join the rest of the former Ninth Circuit in comprising the new Twelfth Circuit. See COMM'N, *supra* note 6, at 56.

174. See *supra* Part II-C-(6).

175. See, e.g., Michael Traynor and Joseph P. Russoniello, Attorneys at Cooley Godward, LLP, Statement to the Commission on Structural Alternatives for the Federal Courts of Appeals (May 29, 1998). The main objection raised was the inconsistent state of law that would exist throughout California in the event that the two circuits within the state decide differently on a matter. For example, suppose litigation regarding Proposition 209, which challenged the constitutionality of an initiative that prohibited racial and gender preferences, was struck down in one circuit, but upheld in the other. For statewide entities, including numerous agencies and universities, the dual holdings will destroy any attempt to create a uniform statewide system and will certainly create confusion. *Id.*

176. See *supra* Part II-C-(2).

177. The Ninth Circuit was first formed by the Act of July 23, 1866, 14 Stat. 209.

178. Spreng, *supra* note 2, at 924.

179. See *id.* at 973.

180. See Tobias, *supra* note 7 (referring to independent analysis conducted by University of Pittsburgh law professor Arthur Hellman).

in place designed to reduce potential inconsistencies.¹⁸¹ Some argue that splitting the Circuit will actually reduce consistency by splitting the Pacific coast between two circuits.¹⁸² The split may increase business expenses for industries that are reliant on consistent utilities, maritime, and commercial law.¹⁸³ In short, splitting the circuit will not significantly reduce travel time, nor will it significantly increase cohesiveness and collegiality.

D. What Are the Actual Motivations for Splitting the Circuit?

Most proponents of the split proposals rationalize their view based on the administrative difficulties created by the size and burgeoning caseload of the Ninth Circuit.¹⁸⁴ Indeed, these arguments are well founded given the fact that the Ninth Circuit has far more people, more judges, and more land area than any other circuit.¹⁸⁵ However, a closer look at the arguments of most proponents of the split reveals that they may be more politically motivated. Indeed, there is much evidence that suggests that the aforementioned administrative arguments are only a veneer to deeper political motivations.

Many proponents of the split are Congressmen from Northwestern states who believe that California dominates the decisions of the Circuit. In some cases, these views are readily evident. For example, one Washington senator, upon introduction of a bill to split the circuit said, “Northwestern states, including my state of Washington, is [sic] simply dominated by California judges, and California attitudes. We in the Northwest have developed our own interests in every aspect of the law from natural resources to international trade. Our interests cannot be fully addressed from a California perspective.”¹⁸⁶ A *Seattle Post Intelligence* report on August 9, 1991, recounted that the senator from Washington was “particularly displeased with recent pro-environment

181. For example, the Circuit employs staff attorneys to review every appeal and code the issues. *Id.* This process makes it easier for judges to identify relevant precedents as well as possible conflicts. Furthermore, when cases with analogous issues arise, they are appointed to the same panel. *Id.* Lastly, the court employs a limited en banc hearing procedure to reduce inconsistency, and is experimenting with a larger en banc panel of fifteen, rather than eleven judges. *See id.*

182. *See id.*

183. *See id.*

184. *See supra* Part II-A.

185. *See* COMM’N, *supra* note 6, at 26. The Ninth Circuit has a population of 51,453,880, an area of 1,347,498 sq. mi., and a total of 28 circuit judges. *Id.* For comparison, the next largest in terms population is the Sixth Circuit with 30,236,545. *Id.* In terms of area, the next largest is the Eighth Circuit, at 478,233 sq. mi. *Id.* The next largest in terms of circuit judgeships is Fifth Circuit, with seventeen judges. *Id.*

186. Frank, *supra* note 112.

rulings in the Ninth Circuit court.”¹⁸⁷ Another report in the *Washington Post* on September 8, 1997 quoted former Senator Conrad Burns as saying “[W]e are seeing an increase in legal actions against economic activities in states like Montana, such as timbering, mining and water development. This threatens local economic stability.”¹⁸⁸ Senator Burns was also quoted as saying “California thinking and California appeals dominate the Ninth Circuit.”¹⁸⁹ He later supported a proposal by Senator Ted Stevens (R-AK) to split the Circuit by voicing his desire for judges “who would be more sensitive to how we manage our own resources.”¹⁹⁰ These statements demonstrate hostility, bordering on xenophobia, toward California. They invoke a spirit not just of separatism, but also of repudiation.

These quotes from legislators from the Northwest are a testament to the true intent behind a Ninth Circuit split. Logically, this begs the question of whether or not California really dominates the Ninth Circuit. Evidence suggests that it does not. Former Chief Judge Wallace aptly noted that the above quotes from congressmen imply two things: that the decisions from the Ninth Circuit are consistently pro-environment and that a new circuit, comprised of northwest states, will be less favorable toward environmental concerns and more favorable toward economic issues.¹⁹¹ Interestingly, a study of 125 of the most recent environmental cases in the Ninth Circuit revealed that 64 cases have been decided in favor of environmental concerns, while 61 have been decided against those concerns.¹⁹² Even more striking is that of the 64 pro-environment cases, two-thirds of those cases had judges both from the northern and southern portions of the district.¹⁹³ Of the 61 cases decided against environmental interests, almost all panels consisted of both northern and southern judges.¹⁹⁴ The main point is that there is no striking difference between judges from the Northwestern states and judges from California.

Certainly not everyone from the Northwest believes they are dominated by California. Former Chief Judge Goodwin, an Oregonian, fervently discredits arguments that California dominates the Ninth Circuit.¹⁹⁵ According to Judge Goodwin,

187. *Id.*

188. Richard C. Reuben, *Split Decision Pending in Congress: Judiciary Committee OKs Bill to Divide 9th Circuit, Despite Judges' Opposition*, 82 A.B.A. J. 34 (Feb. 1996).

189. Frank, *supra* note 112.

190. *See* Lewis, *supra* note 159.

191. Frank, *supra* note 112.

192. *Id.*

193. *Id.*

194. *Id.*

195. *See id.*

California is the dominant ranking and commercial center for the West Coast. California has major ports which accommodate much of the international trade of the United States. [Y]et I see no evidence that judges from Sacramento, San Francisco, Los Angeles, San Diego and other California posts dominate our court. For 17 years our chief judge was from Arizona. For the next 12 years our chief judge was from Montana. I happen to be from Oregon. If there is California domination, I am afraid Diogenes and his lantern will have to find it.¹⁹⁶

Although the present Chief Judge, Alex Kozinski is a Californian, the previous Chief Judge, Mary Schroeder, was from Arizona and before her, Chief Judge Proctor Hug, Jr., was from Nevada. This evidence supports Judge Goodwin's assertion that California does not dominate the Ninth Circuit.

E. How Would a Split Affect Environmental Considerations in the Western United States?

There is no simple answer to this question. The obvious response would be that a split will change the composition of judges deciding these cases and will essentially dilute the influence of the so-called liberal judges. This is the apparent, although somewhat masked, intention of many of the proponents of the split. The result might not be so emphatic, however. The study presented above¹⁹⁷ suggests that the environmental ideological differences between judges in the Northwest and judges in California may not be as stark as presumed. Certainly, a newly created circuit will not affect the jurisprudence of the Ninth Circuit.¹⁹⁸ However, according to Arthur Hellman, a law professor at the University of Pittsburgh, the creation of a new circuit that does not include California would likely be more conservative than the current Ninth Circuit. The division of the Circuit will also create two smaller circuits, thereby making it easier for new conservative appointees to become the new majority. In short, the likelihood of a sudden change resulting from a circuit split appears slim. However, a split may ultimately allow more conservative, economy-minded judges to become the new majority. This may, in turn, affect the current body of environmental law from the present day Ninth Circuit.

Nearly all the split proposals, with the exception of the proposal from the Commission on Structural Alternatives for the Federal Courts of Appeals, suggest isolating California, in some cases with only Hawaii

196. *Id.* (quoting former Chief Judge Goodwin).

197. *See supra* text accompanying notes 192-94.

198. Glater, *supra* note 1.

and the Pacific territories, and in other cases with one or two other states.¹⁹⁹ The likelihood of a split radically changing the ideology of the remnants of Ninth Circuit is slim, given the fact that the split is designed to isolate the more liberal faction of the former circuit. However, should the proposed Twelfth Circuit come to fruition, and if the predictions that the new circuit will be more conservative are correct, then the likelihood of that circuit overturning key environmental jurisprudence is significant.

Ultimately, the composition and political tendencies of the circuits are not dependent on the geography of the circuit. Rather, it is dependent on the number of vacancies that appear during different presidential administrations. Therefore, the likelihood of a conservative Twelfth Circuit increases in the event of a conservative President. It is clear that congressmen from the Northwest United States and Alaska, such as Ted Stevens, are prepared to lobby any President for the appointment of conservative judges. Although it is impossible to predict the future, the possibility of a conservative President and a conservative Congress is real. The subsequent environmental impacts could be significant.

Conservative lawmakers are eager to have a judiciary who will be more sympathetic to the economic interests of the Northwest. They, therefore, are much more likely to support judicial nominees who support the timber industry as a result of the numerous federal forest lands in the region. If judges like these come to dominate the newly created Twelfth Circuit, the holding in *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*²⁰⁰ will likely be overturned. That case restricted timber harvest within areas designated as critical habitat for the threatened northern spotted owl. Cases like this one infuriated lawmakers in the Pacific Northwest and reignited calls to split the circuit.²⁰¹ At stake is the survival of a species that, according to Congress, has “aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.”²⁰² Further, the United States “has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction.”²⁰³ It is important to note that the courts did not pass the environmental laws to which these senators object. Congress made these laws, and as such, Congress, not the courts, should be the focus of efforts to change the laws.²⁰⁴

199. See *supra* text accompanying notes 65-99.

200. See *supra* Part II-D-(1).

201. See, e.g., Frank, *supra* note 112 (quoting a Senator from Oregon as being “dismayed” by the Ninth Circuit’s handling of the matter).

202. The Endangered Species Act of 1973, 16 U.S.C. § 1531(a)(2) (1973).

203. 16 U.S.C. § 1531(a)(3).

204. See Frank, *supra* note 112.

Many of the other pro-environment decisions may also be overturned in an effort to utilize and potentially exploit our natural resources. The holding *Kootenai Tribe of Idaho v. Veneman*, for example, seeks to protect the public's interest in "precious and unreplaceable resources" by upholding the roadless rule which seeks to protect 58.5 million acres of national forests.²⁰⁵ In announcing their decision, the court stressed that considerations such as the public's interest in preserving the resources must be considered when balancing all factors.²⁰⁶ In overturning such a decision, the proposed Twelfth Circuit may alter the balancing test formulated by Ninth Circuit jurisprudence, opening the door for exploitation of natural resources in the new circuit.

Further exploitation of natural resources will occur if the new circuit overturns the Ninth Circuit's decision in *Northern Plains Resource Council v. Fidelity Exploration and Development Company*, where the court held that groundwater derived from coal bed methane constituted a "pollutant" under the Clean Water Act.²⁰⁷ The new circuit, in an effort to stimulate economic activity by easing restrictions on coal mines, would likely hold that such discharges do not fall under the definition of a "pollutant" even though they are laden with suspended solids and other salty minerals. This would ultimately increase the likelihood of water and groundwater pollution.

These predictions represent only a small fraction of the potential environmental ramifications of creating a new and less environmentally-minded circuit.²⁰⁸ While economic factors certainly should not be ignored, they should be considered along side with and in light of environmental considerations. The current test outlined in *Kootenai Tribe of Idaho v. Veneman* seeks to strike such a balance. It is questionable, and even doubtful, if a new Twelfth Circuit, as many split proponents imagine it,²⁰⁹ would strike such a balance.

IV. Conclusion

Although proposals to split the Ninth Circuit might alleviate some administrative burdens, splitting the circuit would, on the whole, be

205. See *supra* text accompanying notes 126-32.

206. 313 F.3d 1094, 1125.

207. See *supra* text accompanying notes 120-25.

208. The Ninth Circuit, given its size and vast tracts of open lands and abundant natural resources, decides numerous environmental cases annually. See Rauber, *supra* note 56. The purpose of this section is only to give several examples of the potential environmental impacts of splitting the Ninth Circuit. It can safely be assumed that the potential impacts reach much farther than the examples provided.

209. See *supra* text accompanying notes 186-90.

detrimental. The burdens of a heavy caseload, long-distant traveling, and a lack of collegiality will not be significantly reduced.²¹⁰ The potential deleterious impacts to the environment are significant.²¹¹ While most proponents of the split claim to seek a divide to alleviate administrative burdens, it is readily evident that there exists underlying motivations to stimulate economic activity by overturning pro-environment decisions,²¹² which may ultimately leave our natural resources subject to greater exploitation and mismanagement.²¹³ Ultimately, the proposed Twelfth Circuit may represent a “Timber, Salmon, and Tribal Lands Circuit,” similar to the “Oil and Gas Circuit,” referring to the relatively new Fifth Circuit.²¹⁴ This will reduce the diversity of the caseload in the Pacific Northwest and will also fractionalize the body of law decided on the West Coast.²¹⁵ In short, the proposals seek to create a circuit that is filled with judges that have a geographical bias that will lead them to respond to local pressures, a notion which is entirely at odds with the idea of a national judiciary.²¹⁶

Split proponents seek to dismember environmental laws that were created by Congress. Should these laws be modified, it should be done so by Congress, not through the delineation of new judiciary boundaries.²¹⁷ This, in essence, is environmental gerrymandering. At a time when environmental phenomena such as global warming appear to be occurring with increasing certainty,²¹⁸ it is clear that we, as a society, must reassess our values. One member of the Senior Advisory Board of the Ninth Circuit bluntly stated that “the desire to cut more trees, catch more fish, and limit more Indians is not a good enough reason to blow up the courthouse.”²¹⁹ For all these practical, moral, and political reasons, proposals to split the Ninth Circuit should be dismissed and the Ninth

210. See *supra* text accompanying notes 165-83.

211. See *supra* text accompanying notes 197-209.

212. See *supra* text accompanying notes 186-90.

213. See Letter, *supra* note 4.

214. See Caplan, *supra* note 37, at 968-69.

215. *Id.*

216. See Frank, *supra* note 112.

217. *Id.*

218. See, e.g., J.T. Houghton, *Climate Change 2001: The Scientific Basis* (2001) (published for the Intergovernmental Panel on Climate Change). This report explains that, taking into account uncertainties, it appears very likely that warming over the past half century has occurred because of an increase in greenhouse gas emissions. *Id.* at 10. It is very likely that the 20th century warming will lead to a significant acceleration of sea level rise. *Id.* In addition to greenhouse gas emissions, one of the major causes of global warming appears to be deforestation. *Id.* at 7. Forests act to store carbon dioxide, a greenhouse gas. *Id.* Deforestation releases the carbon dioxide into the atmosphere and destroys the forests ability to reabsorb the gas, thus contributing significantly to the global warming problem. *Id.*

219. Frank, *supra* note 112.

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Circuit should remain in tact.