

# WHAT'S THE BIG DEAL? THE LET-DOWN THAT IS THE LANDMARK *MONSANTO V.* *GEERTSON CASE*

In June of 2010, the United States Supreme Court delivered its first ruling involving genetically modified agricultural crops.<sup>1</sup> *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010)<sup>2</sup> could have been a true landmark decision, defining the initial limits of the emotionally-charged debate over the use of genetically modified organisms (“GMOs”), and the ethical and environmental concerns associated with them.<sup>3</sup> Instead, it became a lesson for the parties in standing, and a warning to the lower courts to not expand the jurisprudence of injunctive relief in the area of environmental protection.<sup>4</sup> What the Court did not say is almost more important than what it did say. And, not surprisingly in a case where the underlying issues were not really addressed, both sides claimed legitimate victories.<sup>5</sup>

This Comment will briefly discuss the background of the Monsanto Roundup Ready® Alfalfa (“RRA”), and the decisions and arguments in the lower courts leading up to the Supreme Court hearing. This Comment will then discuss the issues before the Supreme Court and how they were decided. This will be followed by an analysis of what the decision meant for each of the groups involved in the litigation, and what it may mean for the future of GMO litigation, and injunctive relief in general. Finally, this Comment will address the title question, “What is the big deal?” Answer: The big-picture issues left undecided.

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<sup>1</sup> *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010).

<sup>2</sup> *Id.*

<sup>3</sup> See Robert Enneser, *GMO Regulatory Practices: Food for Thought*, ON THE EDGES OF SCIENCE AND LAW (July 8, 2010), <http://blogs.kentlaw.edu/islat/2010/07/gmo-regulatory-practices-food-for-thought.html>.

<sup>4</sup> See *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010).

<sup>5</sup> Liz Leslie, *Supreme Court Rules in Monsanto Alfalfa Case, Both Sides Claim Victory*, EARTH EATS, INDIANAPUBLICMEDIA.ORG, <http://indianapublicmedia.org/eartheats/supreme-court-issues-ruling-monsanto-gm-alfalfa-case-won/#> (last visited Jan. 9, 2011).

## I. ROUNDUP READY® ALFALFA: THE SEEDS OF TROUBLE

Roundup® Weed and Grass Killer was introduced to the market by Monsanto in 1976<sup>6</sup> and has been the best-selling herbicide worldwide for the last thirty years.<sup>7</sup> The primary active ingredient in Roundup® is the isopropylamine salt of glyphosate.<sup>8</sup> Monsanto has expanded its product line to include patented plant seeds which have been genetically modified to be tolerant to glyphosate,<sup>9</sup> thus simplifying weed control efforts.<sup>10</sup> Monsanto markets these products as Roundup Ready® crops.<sup>11</sup> These crops allow farmers to use Roundup®, or other glyphosate-based herbicides, for post-emergence applications against most broadleaf and cereal weeds.<sup>12</sup> Roundup Ready® soybeans were the first such crop to be marketed,<sup>13</sup> and Monsanto currently includes canola, corn, cotton, alfalfa and sugar beets in their Roundup Ready® line.<sup>14</sup> The latter two are currently both the subject of controversy.<sup>15</sup>

The Plant Protection Act of 2000 requires the Secretary of Agriculture, through the Animal and Plant Health Inspection Service (“APHIS”), to “prevent the introduction of plant pests within the United States or the dissemination of plant pests within the United States.”<sup>16</sup> The regulations that have been promulgated to that end essentially presume any genetically modified plant organism to be a plant pest, until determined to be otherwise.<sup>17</sup> A company or individual may petition APHIS for a determination that the organism is not a plant pest, and is therefore not subject to regulation.<sup>18</sup> A decision by APHIS to approve such a petition triggers

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<sup>6</sup> *Who We Are, Company History*, MONSANTO.COM, <http://www.monsanto.com/who-we-are/Pages/monsanto-history.aspx> (last visited Jan. 14, 2011).

<sup>7</sup> *Glyphosate/Round-up Spraying*, THEPOWERHOUR.COM, [http://www.thepowerhour.com/news/glyphosate\\_roundup.htm](http://www.thepowerhour.com/news/glyphosate_roundup.htm) (last visited Feb. 21, 2011).

<sup>8</sup> MONSANTO, ROUNDUP ORIGINAL HERBICIDE LABEL 1, 2008, available at [http://fs1.agrian.com/pdfs/ROUNDUP\\_ORIGINAL\\_HERBICIDE\\_Label1.pdf](http://fs1.agrian.com/pdfs/ROUNDUP_ORIGINAL_HERBICIDE_Label1.pdf).

<sup>9</sup> See, e.g., *Alfalfa*, MONSANTO.COM, <http://www.monsanto.com/products/Pages/alfalfa.aspx> (last visited Dec. 30, 2010).

<sup>10</sup> *Alfalfa*, *supra* note 9.

<sup>11</sup> *Agricultural Seeds*, MONSANTO.COM, <http://www.monsanto.com/products/Pages/monsanto-agricultural-seeds.aspx> (last visited Jan. 14, 2010).

<sup>12</sup> See, e.g., *Alfalfa*, *supra* note 9.

<sup>13</sup> *Who We Are, Company History*, *supra* note 6.

<sup>14</sup> *Agricultural Seeds*, *supra* note 11.

<sup>15</sup> See *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010); *Center for Food Safety v. Vilsack*, No. C 10-04038 JSW, 2010 WL 4869117 (N.D.Cal. Dec. 1, 2010).

<sup>16</sup> 7 U.S.C. § 7711(a) (2000).

<sup>17</sup> See 7 C.F.R. § 340.2 (1993).

<sup>18</sup> 7 C.F.R. § 340.6 (1997).

National Environmental Policy Act (“NEPA”) procedures to determine the environmental impact, if any, of such a decision.<sup>19</sup>

In 2004, Monsanto filed such a petition for Roundup Ready® Alfalfa (“RRA”), requesting a determination that RRA was not subject to the regulation.<sup>20</sup> APHIS prepared an Environmental Assessment (“EA”), taking into account 300 field trials authorized over eight years, and making a finding of no significant impact (“FONSI”).<sup>21</sup> A FONSI allows a federal agency to move forward on an action without completing an Environmental Impact Statement (“EIS”), which are required for all major federal actions significantly affecting the environment.<sup>22</sup> APHIS then granted Monsanto’s petition, deregulating RRA unconditionally,<sup>23</sup> and RRA went on the market in 2005.<sup>24</sup> According to Monsanto, “5,485 growers in forty-eight states have planted more than 263,000 acres of RRA.”<sup>25</sup>

In 2006, a consortium of conventional alfalfa growers and environmental groups bought suit against the USDA and APHIS, claiming that the deregulation of RRA was a major federal action requiring an EIS to be completed.<sup>26</sup> They also claimed that the EA prepared by APHIS was deficient in not addressing the potential environmental impacts of unregulated use of RRA.<sup>27</sup> The concerns revolved around cross-contamination of conventional alfalfa by RRA and the myriad of industry wide effects that could occur, such as loss of export markets and infiltration into the organic agriculture industry segment.<sup>28</sup> Another major concern was that the increased use of glyphosates would contribute to, and

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<sup>19</sup> 7 C.F.R. §§ 372.3–372.10 (1995).

<sup>20</sup> *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743, 2750 (2010); Notice of Determination of Nonregulated Status for Alfalfa Genetically Engineered for Tolerance to the Herbicide Glyphosate, 70 Fed. Reg. 36917, 36919 (Jun. 27, 2005).

<sup>21</sup> Notice of Determination of Nonregulated Status, 70 Fed. Reg. at 36919. See *Monsanto*, 130 S.Ct. at 2750.

<sup>22</sup> *National Environmental Policy Act: Basic Information*, EPA.GOV (Oct. 21, 2010), <http://www.epa.gov/Compliance/basics/nepa.html>.

<sup>23</sup> Notice of Determination of Nonregulated Status, 70 Fed. Reg. at 36919.

<sup>24</sup> *Timeline of Key Roundup Ready Alfalfa Events*, MONSANTO.COM, <http://www.monsanto.com/newsviews/Pages/roundup-ready-alfalfa-timeline.aspx> (last visited Dec. 30, 2010).

<sup>25</sup> *Roundup Ready Supreme Court Case*, MONSANTO.COM, <http://www.monsanto.com/newsviews/Pages/roundup-ready-alfalfa-supreme-court.aspx> (last visited Dec. 30, 2010).

<sup>26</sup> First Amended Complaint for Declaratory and Injunctive Relief at 36-37, *Geertson Seed Farms v. Johanns*, 439 F.Supp.2d 1012 (N.D.Cal. 2007) (No. C 06-1075 CRB). The plaintiffs consisted of the following parties: Geertson Seed Farms, of Oregon; Trask Family Seeds, of South Dakota; Center for Food Safety; Beyond Pesticides; Cornucopia Institute; Dakota Resource Council; National Family Farm Coalition; Sierra Club; and Western Organization of Resource Councils. *Id.* at 1.

<sup>27</sup> *Id.* at 34-36.

<sup>28</sup> *Id.* at 27-33.

radically exacerbate, the evolution of glyphosate tolerant “superweeds” and glyphosate resistant feral alfalfa.<sup>29</sup> The concern over RRA, as opposed to other previously marketed Roundup Ready® crop seeds, was that alfalfa was the first genetically altered perennial crop deregulated,<sup>30</sup> thus increasing the likelihood of cross-contamination and permanent alteration of the alfalfa gene pool.

## II. IN THE DISTRICT COURT: A “RUN-OF-THE-MILL” NEPA CASE

### A. *The Preliminary Injunction*

After allowing a number of interveners, including Monsanto, into the suit,<sup>31</sup> the District Court for the Northern District of California concluded in February of 2007, that APHIS and the USDA had violated NEPA by failing to prepare an EIS prior to deregulating RRA.<sup>32</sup> Although APHIS had prepared an EA,<sup>33</sup> the court found it inadequate, specifically due to APHIS’s failure to adequately address the risk of contamination to conventional and organic alfalfa, and the potential development of Roundup® resistant weeds.<sup>34</sup> Although the court was willing to accept additional evidence from the parties and interveners to assist them in developing a final remedy,<sup>35</sup> the court initially grappled with what to provide in terms of preliminary relief.<sup>36</sup> This dilemma was primarily due to the large number of innocent third-party farmers who had already planted, or had purchased and were about to plant, RRA in reliance on APHIS’s deregulation decision.<sup>37</sup> Although it ultimately provided an immediate exception for such farmers,<sup>38</sup> the court felt that an injunction was the only appropriate remedy for the NEPA violation.<sup>39</sup>

In words that would come to haunt the District Court later, it cited *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 833 (9th Cir. 2002),

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<sup>29</sup> *Id.* at 28-29.

<sup>30</sup> See Brief for Respondents at 43-44, *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010) (No. 09-475).

<sup>31</sup> *Geertson Seed Farms v. Johanns*, No. C 06-0175 CRB, 2007 WL 776146 at \*1 (N.D. Cal. Mar. 12, 2007).

<sup>32</sup> *Geertson Seed Farms v. Johanns*, No. C 06-0175 CRB, 2007 WL 518624 at \*12 (N.D. Cal. Feb. 13, 2007).

<sup>33</sup> Notice of Determination of Nonregulated Status for Alfalfa Genetically Engineered for Tolerance to the Herbicide Glyphosate, 70 Fed. Reg. 36917, 36919 (June 27, 2005).

<sup>34</sup> *Geertson*, 2007 WL 518624 at \*12.

<sup>35</sup> *Geertson*, 2007 WL 776146 at \*3.

<sup>36</sup> *Id.* at \*1-3.

<sup>37</sup> *Id.* at \*1-3.

<sup>38</sup> *Id.* at \*2-3.

<sup>39</sup> *Id.* at \*1-2.

when it concluded that “[i]n the run of the mill NEPA case, the contemplated project . . . is simply delayed [by injunction] until the NEPA violation is cured.”<sup>40</sup> Although the court noted that the third-party growers’ reliance on the APHIS decision made this case “not so run of the mill,”<sup>41</sup> it was, in all other respects, a “run of the mill” NEPA case.<sup>42</sup> Therefore, unless the defendants demonstrated “unusual circumstances,” an injunction was the appropriate remedy.<sup>43</sup> The court granted a preliminary injunction, vacating the deregulation decision and banning all sales or planting of RRA seed after March 30, 2007, except for seed that had already been planted, or that was already purchased and would be planted before March 30, 2007.<sup>44</sup>

### B. The Permanent Injunction – What Legal Standard?

In May 2007, the court issued a permanent injunction that repeated the preliminary order vacating APHIS’s deregulation decision and enjoining planting of RAA.<sup>45</sup> It added conditions for the management and harvesting of the RRA that had already been planted and ordered APHIS to prepare of an EIS.<sup>46</sup> Prior to issuing the permanent injunction, the court requested each side to submit proposals for the permanent relief to be ordered.<sup>47</sup> Plaintiffs sought maintenance of the status quo<sup>48</sup> – in essence a permanent continuation of the preliminary injunction – plus the addition of enjoining the harvesting of any previously planted RRA seed, and publication of the locations of current RRA crops.<sup>49</sup> APHIS and intervenor Monsanto proposed a partial deregulation that would allow the continued sale, planting, and harvesting of RRA under certain conditions.<sup>50</sup> These included the requirement for isolation distances between RRA fields and conventional fields, prohibition on adding pollinators to RRA fields, requiring RRA growers to keep records on non-RRA crops

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<sup>40</sup> *Id.* at \*1 (citing *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 833 (9th Cir. 2002)).

<sup>41</sup> *Id.* at \*1.

<sup>42</sup> *Id.* at \*2.

<sup>43</sup> *Id.* at \*1-2. See *Forest Conservation Council v. U.S. Forest Service*, 66 F.3d 1489, 1496 (9th Cir. 1995); *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985).

<sup>44</sup> *Geertson*, 2007 WL 776146 at \*3.

<sup>45</sup> *Geertson Farms v. Johanns*, No. C 06-0175 CRB, 2007 WL 1302981 at \*9 (N.D. Cal. May 3, 2007), *aff’d* 570 F.3d 1130 (9th Cir. 2009), *rev’d sub nom.* *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at \*2.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

grown within 500 feet of their field, and to require specific harvesting conditions and procedures that would minimize gene flow and commingling of crops and seed.<sup>51</sup>

The court found the remedy proposed by APHIS inadequate to protect the environment from the possible harm of gene flow to organic and conventional crops while the EIS was being prepared.<sup>52</sup> Although APHIS and Monsanto requested an evidentiary hearing in order to allow the court to assess the risk of contamination if their proposal was used, the court declined to “engage in precisely the same inquiry it concluded APHIS failed to do and must do in an EIS.”<sup>53</sup> Interestingly, however, the court used the APHIS proposal almost verbatim for the conditions to be imposed on the third party farmers who would be allowed to grow and harvest their already planted RRA.<sup>54</sup>

Although the court paid lip service to the “traditional balance of harms analysis, even in the context of environmental litigation,”<sup>55</sup> and acknowledged that a NEPA violation does not lead to the automatic issuing of an injunction,<sup>56</sup> its discussion of the legal standard focused on the same rationale as the preliminary injunction.<sup>57</sup> The court repeated its citation of *Idaho Watershed*,<sup>58</sup> and its opinion that an injunction is the appropriate remedy for the “run of the mill NEPA case.”<sup>59</sup> It supported this with language from the Ninth Circuit in *National Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 737 (9th Cir. 2001), which held, “where an EIS is required, allowing a potentially environmental damaging project to proceed prior to its preparation runs contrary to the very purpose of the statutory requirement.”<sup>60</sup> *National Parks* further held that an injunction is appropriate because “[e]nvironmental injury, by its nature, can seldom

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at \*4-5.

<sup>53</sup> *Id.* at \*4.

<sup>54</sup> *Id.* at \*9.

<sup>55</sup> *Id.* at\*3 (citing *Forest Conservation Council v. U.S. Forest Service*, 66 F.3d 1489, 1496 (9th Cir. 1995)).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*; *Geertson Seed Farms v. Johanns*, No. C 06-0175 CRB, 2007 WL 776146 at \*1-2 (N.D. Cal. Mar. 12, 2007).

<sup>58</sup> *Geertson*, 2007 WL 1302981 at \*3; *Geertson*, 2007 WL 776146 at \*1. See *Idaho Watersheds Project v. Hahn*, 307 F.3d, 815, 833 (9th Cir. 2002), *abrogated by* *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010).

<sup>59</sup> *Geertson*, 2007 WL 1302981 at \*3; *Geertson*, 2007 WL 776146 at \*1-2.

<sup>60</sup> *Geertson*, 2007 WL 1302981 at \*3 (citing *Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 737 (9th Cir. 2001), *abrogated by* *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010)).

be remedied by money damages . . . .”<sup>61</sup> The court cited *National Parks* once more, when it stated that “[t]he Ninth Circuit has nevertheless recognized that ‘in “unusual circumstances” an injunction may be withheld, or more likely, limited in scope.’”<sup>62</sup>

The holdings of *Idaho Watershed* and *National Parks* turn the legal standard for injunctive relief on its head. Injunctions, while an equitable remedy within the discretion of the court, have also been traditionally considered an exceptional remedy.<sup>63</sup> This is because the injunction is backed up by the contempt power of the court, which has the power to take the non-compliant defendant’s liberty.<sup>64</sup> The traditional position has been that the court should award legal (monetary) damages as the rule, and specific relief, such as injunctions, only when the legal damages would be inadequate to place the plaintiff in their rightful position.<sup>65</sup> The standards for this showing were explicitly stated together for the first time by the United States Supreme Court in *eBay, Inc. v. Mercexchange, L.L.C.*, 547 U.S. 388 (2006).<sup>66</sup>

According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as money damages, are inadequate to compensate for that injury; (3) that, considering the balance of the hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.<sup>67</sup>

In essence, the Ninth Circuit had created a separate standard that presumed injunctive relief appropriate in cases of NEPA violations, absent unusual circumstances, instead of the other way around. The holding articulated in *eBay*, however, clearly stands for the proposition that monetary relief is the presumed remedy, unless the test for injunctive relief is met.<sup>68</sup> In this case, it appears that the factor of irreparable injury

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<sup>61</sup> *Id.* (citing Nat’l Parks & Conservation Ass’n v. Babbitt, 241 F.3d 722, 737 (9th Cir. 2001), *abrogated by* Monsanto Co. v. Geertson Seed Farms, 130 S.Ct. 2743 (2010)).

<sup>62</sup> *Id.* (citing Nat’l Parks & Conservation Ass’n v. Babbitt, 241 F.3d 722, 737 n.18 (9th Cir. 2001), *abrogated by* Monsanto Co. v. Geertson Seed Farms, 130 S.Ct. 2743 (2010)).

<sup>63</sup> *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-12 (1982).

<sup>64</sup> 42 Am. Jur. 2d *Injunctions* § 299 (2010) (discussing the use of the contempt power to enforce injunctions).

<sup>65</sup> 42 Am. Jur. 2d *Injunctions* § 26 (2010) (discussing the availability of injunctive relief in relation to the adequacy of other types of relief, including money damages).

<sup>66</sup> *eBay, Inc. v. Mercexchange, L.L.C.*, 547 U.S. 388, 391 (2006).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

was presumed since the risk of contamination was, by its own words,<sup>69</sup> not to be assessed by the court.

### III. THE NINTH CIRCUIT APPEAL

APHIS and Monsanto appealed the District Court decision on several grounds. First, they argued that the District Court improperly presumed irreparable injury instead of applying the four-factor test required by *eBay*,<sup>70</sup> including an argument that they improperly shifted the burden of proof.<sup>71</sup> Second, they contended that the resulting injunction was overbroad and failed to give deference to the agency proposal.<sup>72</sup> Monsanto also argued that the court's failure to allow an evidentiary hearing to determine the merits of the APHIS proposal was error.<sup>73</sup> In response, the plaintiffs argued that the court applied the correct legal standard<sup>74</sup> and that it did not abuse its discretion<sup>75</sup> in fashioning a "middle ground" remedy.<sup>76</sup>

#### A. Irreparable Injury and Inadequate Legal Remedy

According to *eBay*, the plaintiff must show, among other things, that they have suffered "irreparable injury"<sup>77</sup> – or one that is irreparable at law. While the second factor of *eBay* shows a separate factor of inadequate legal remedy,<sup>78</sup> the term "irreparable injury" essentially absorbs the second

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<sup>69</sup> *Geertson Farms v. Johanns*, No. C 06-0175 CRB, 2007 WL 1302981 at \*4 (N.D. Cal. May 3, 2007), *aff'd* 570 F.3d 1130 (9th Cir. 2009), *rev'd sub nom.* *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010).

<sup>70</sup> Opening Brief of the Federal Defendants-appellants at 23-29, *Geertson Seed Farms v. Johanns*, 570 F.3d 1130 (9th Cir. 2009) (Nos. 07-16458, 07-16492, 07-16725); Intervenor-appellants' Opening Brief at 30-35, *Geertson Seed Farms v. Johanns*, 570 F.3d 1130 (9th Cir. 2009) (Nos. 07-16458, 07-16492, 07-16725).

<sup>71</sup> Opening Brief of the Federal Defendants-appellants, *supra* note 70, at 29; Intervenor-appellants' Opening Brief, *supra* note 70, at 35-39.

<sup>72</sup> Opening Brief of the Federal Defendants-appellants, *supra* note 70, at 29-45; Intervenor-appellants' Opening Brief, *supra* note 70, at 40-46.

<sup>73</sup> Intervenor-appellants' Opening Brief, *supra* note 70, at 46-49.

<sup>74</sup> Plaintiff-Appellees' Answering Brief at 20-29, *Geertson Seed Farms v. Johanns*, 570 F.3d 1130 (9th Cir. 2009) (Nos. 07-16458, 07-16492, 07-16725), 2008 WL 937141 at \*20-\*29 (C.A.9).

<sup>75</sup> "The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion." *eBay, Inc. v. Mercexchange, L.L.C.*, 547 U.S. 388, 391 (2006).

<sup>76</sup> Plaintiff-Appellees' Answering Brief, *supra* note 74, at 29-65.

<sup>77</sup> *eBay*, 547 U.S. at 391.

<sup>78</sup> *Id.*

factor in practice.<sup>79</sup> The two combine to stand for the proposition that a plaintiff who is able to show an injury that cannot adequately be compensated by legal remedies, usually money, can only be restored to their rightful position<sup>80</sup> by ordering the defendant to do, or not do, something. The final two factors of *eBay*<sup>81</sup> relate to whether, and to a large extent what, the court should actually order if the first two factors are met.

The primary argument of APHIS and Monsanto was that the district court did not require the plaintiffs to prove anything other than the NEPA violation itself.<sup>82</sup> The district court, following the Ninth Circuit's lead,<sup>83</sup> then held that unless there was an "unusual circumstance," an injunction was warranted.<sup>84</sup> Both APHIS and Monsanto, while challenging the incorrect legal standard used to determine if injunctive relief was appropriate,<sup>85</sup> used this argument primarily to address the scope of the injunction.<sup>86</sup> This is because how the harm is defined directly impacts the allowable scope of the injunction, and will be explored more fully in the next section. Interestingly, however, they ignored two obvious arguments, one of which was later picked up by the Supreme Court and will be discussed at Part V., *infra*.<sup>87</sup> The other was never really addressed in any of the briefs or opinions – whether legal damages were adequate.<sup>88</sup>

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<sup>79</sup> "The very thing which makes an injury 'irreparable' is the fact that no remedy exists to repair it." *Bannercraft Clothing Co. v. Renegotiation Board*, 466 F.2d 345, 357 n.9 (D.C. Cir. 1972), *rev'd on other grounds*, 415 U.S. 1 (1974).

<sup>80</sup> The rightful position standard embodies the premise that the plaintiff should be returned to the position they would have been in but for the wrong occurring. DOUGLAS LAYCOCK ET AL. *MODERN AMERICAN REMEDIES* 14-15 (Vicki Been et al. eds., 4th ed. 2010) "The phrase is inspired by Judge John Minor Wisdom's use of 'rightful place' in a dispute about seniority rights; he took the phrase from a student note." *Id.* (citing *Local 189, United Papermakers v. United States*, 416 F.2d 980, 988 (5th Cir. 1969)).

<sup>81</sup> *eBay*, 547 U.S. at 391.

<sup>82</sup> See Opening Brief of the Federal Defendants-appellants, *supra* note 70, at 28; Intervenor-appellants' Opening Brief, *supra* note 70, at 38.

<sup>83</sup> See *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 833 (9th Cir. 2002), *abrogated by Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010); *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 737 & n.18 (9th Cir. 2001), *abrogated by Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010).

<sup>84</sup> *Geertson Farms v. Johanns*, No. C 06-0175 CRB, 2007 WL 1302981 at \*3 (N.D. Cal. May 3, 2007), *aff'd* 570 F.3d 1130 (9th Cir. 2009), *rev'd sub nom. Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010).

<sup>85</sup> Opening Brief of the Federal Defendants-appellants, *supra* note 70, at 23-29; Intervenor-appellants' Opening Brief, *supra* note 70, at 30-39.

<sup>86</sup> Opening Brief of the Federal Defendants-appellants, *supra* note 70, at 29-46; Intervenor-appellants' Opening Brief, *supra* note 70, at 40-46.

<sup>87</sup> This was the argument that the injunction was not even necessary since it had the same effect as the vacatur. See *infra* Part V.

<sup>88</sup> See *infra* Part VI.

Ultimately, the district court only defined the injury in terms of the NEPA violation itself, determining this was all that was required to issue a blanket injunction banning all future activity.<sup>89</sup> The district court failed to hold the plaintiffs accountable to prove that harm would occur, and instead held that the defendant's analysis was inadequate to show that harm would not occur.<sup>90</sup> They then proclaimed that in light of the defendant's inadequate analysis, "the plaintiffs have sufficiently established irreparable injury."<sup>91</sup> The Ninth Circuit read much into the district court's opinion, and ignored much as well, when it concluded that the district court had not presumed irreparable harm from the NEPA violation.<sup>92</sup>

Carefully avoiding the term "run of the mill NEPA case," the appellate court properly delineated *eBay* as the standard, even in environmental litigation,<sup>93</sup> but essentially held that the district court's one line disclaimer that in NEPA cases injunctions were not automatic<sup>94</sup> was sufficient to show it applied the proper legal standard,<sup>95</sup> even though *eBay* was never mentioned in the district court opinion.<sup>96</sup> The appellate court then specifically stated that the district court "discussed each of the four factors of the traditional balancing test. . . ."<sup>97</sup> This was a generous reading, at best. After articulating its erroneous legal standard,<sup>98</sup> the district court then engaged in a nearly two page dissection of the inadequacies of the defendant's proposal for the permanent injunction.<sup>99</sup> Immediately after lambasting the defendants' failure to prove the harm would not occur,<sup>100</sup> the district court opined, "[w]ith this context in mind, the Court finds the plaintiffs have sufficiently established irreparable injury . . . ."<sup>101</sup> The district court then stated in one paragraph that some contamination

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<sup>89</sup> See *Geertson*, 2007 WL 1302981 at \*3-6

<sup>90</sup> *Id.* at \*4-5.

<sup>91</sup> *Id.* at \*6.

<sup>92</sup> *Geertson Seed Farms v. Johanns*, 570 F.3d 1130, 1137 (9th Cir. 2009), *rev'd sub nom.* *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010).

<sup>93</sup> *Id.* at 1136.

<sup>94</sup> "Upon a finding of a NEPA violation and injunction does not automatically issue; 'injunctive relief is an equitable remedy, requiring the court to engage in the traditional balance of harms analysis, even in the context of environmental litigation.'" *Geertson*, 2007 WL 1302981 at \*3 (citing *Forest Conservation Council v. U.S. Forest Service*, 66 F.3d 1489,1496 (9th Cir. 1995)).

<sup>95</sup> *Geertson*, 570 F.3d at 1137.

<sup>96</sup> See *Geertson*, 2007 WL 1302981.

<sup>97</sup> *Geertson*, 570 F.3d at 1137.

<sup>98</sup> *Geertson*, 2007 WL 1302981 at \*3

<sup>99</sup> *Id.* at \*4-5.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at \*6.

had occurred,<sup>102</sup> and that it was irreparable environmental harm,<sup>103</sup> although the court further stated that a crop so damaged could be replanted in two to four years.<sup>104</sup> This is certainly neither permanent nor incapable of being quantified. Additionally, nowhere did the court articulate a finding that the plaintiffs had proved that there was risk of such contamination to them.<sup>105</sup> The district court then went on to “balance the harms” without ever discussing the adequacy of a legal remedy.<sup>106</sup>

The appellate court did not do much more. Without much to work with, it could only reiterate the district court’s circular “conclusions” as to irreparable harm, which it stated to be sufficient.<sup>107</sup> With nothing in the record regarding the adequacy of a legal remedy, it jumped immediately to balancing the hardships and the public interest.<sup>108</sup> The appellate court failed to concede the apparent shift of burden to the defendants due to the “presumption” attached by the district court to the NEPA violation.<sup>109</sup> In all fairness, the issue of irreparable injury was likely much closer than what appears in both opinions. Unfortunately, however, it was the way the court defined the “irreparable injury” that created such a problem with the scope.

### B. Injunction-junction, What's Your Function?

The real thrust of APHIS’s and Monsanto’s appeal was that the scope of the permanent injunction was overbroad, and failed to give deference to the agency’s proposal.<sup>110</sup> The function of an injunction in this situation is to prevent harm,<sup>111</sup> and because it is coercive in nature,<sup>112</sup> it must be narrowly tailored to put the least amount of restriction on the defendants

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *See id.* at \*1-8.

<sup>106</sup> *Id.* at \*6-8.

<sup>107</sup> *Geertson Seed Farms v. Johanns*, 570 F.3d 1130, 1137 (9th Cir. 2009), *rev'd sub nom.* *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010).

<sup>108</sup> *Id.* at 1138.

<sup>109</sup> *See id.* at 1137.

<sup>110</sup> Opening Brief of the Federal Defendants-appellants, *supra* note 70, at 30-46; Intervenor-appellants’ Opening Brief, *supra* note 70, at 40-46.

<sup>111</sup> LAYCOCK, ET AL., *supra* note 80 at 265 (“The injunction against future violations of law seeks to maintain plaintiff in his rightful position – to ensure that he is not illegally made worse off. It seeks to prevent harm rather than compensate for harm already suffered.”).

<sup>112</sup> *Id.* (describing a preventative injunction as a “coercive remedy, because it seeks to accomplish its preventative goals by coercing defendant’s behavior.”)

while preventing the harm identified to the plaintiffs.<sup>113</sup> This is why the court's identification of the harm is so important. In cases involving government defendants, deference is traditionally given to the government entity in fashioning a remedy that achieves the necessary relief.<sup>114</sup> This was noted to be true in the Ninth Circuit, especially in cases where the subject matter involves technical or scientific expertise.<sup>115</sup> In this case, APHIS argued that the harm articulated by the district court, the risk of contamination to conventional and organic alfalfa crops, was almost eliminated by APHIS's proposal.<sup>116</sup> The blanket injunction, they argued, reached well beyond what was required and acted as more of a punitive measure.<sup>117</sup>

The details of the arguments for a more narrowly tailored injunction are compelling. First, APHIS and Monsanto noted a number of Ninth Circuit cases where activity was allowed to continue, and arguably even increase, while a NEPA violation was being cured.<sup>118</sup> This was especially true when the plaintiff failed to prove a likelihood of irreparable harm, as was the case here. They pointed out how in *Idaho Watersheds*, regarding the issuance of grazing permits, that the affirmed injunction allowed more grazing to occur than what was occurring at the time of the judgment.<sup>119</sup> They argued that in *Westlands Water District v. United States Department of the Interior*, 376 F.3d 853, 877 (9th Cir. 2004), the court allowed increased water releases to go forward,<sup>120</sup> and in *Northern Cheyenne Tribe v. Norton*, 503 F.3d 836, 846 (9th Cir. 2007), the court

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<sup>113</sup> See *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1297 (9th Cir. 1992).

<sup>114</sup> See LAYCOCK, ET AL., *supra* note 80 at 322-23, 329-30. See also *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 831 (9th Cir. 2002), *abrogated by* *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010); *Nat'l Wildlife Fed'n v. Army Corps of Eng'rs*, 384 F.3d 1163, 1174 (9th Cir. 2004).

<sup>115</sup> *Geertson Seed Farms v. Johanns*, 570 F.3d 1130, 1138-39 (9th Cir. 2009), *rev'd sub nom.* *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010) (citing *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 831 (9th Cir. 2002), *abrogated by* *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010)).

<sup>116</sup> Opening Brief of the Federal Defendants-appellants, *supra* note 70, at 30-36.

<sup>117</sup> *Id.* at 26-29.

<sup>118</sup> See *infra* text accompanying notes 119-122.

<sup>119</sup> Opening Brief of the Federal Defendants-appellants, *supra* note 70, at 37, 41 (citing *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 830-31 (9th Cir. 2002), *abrogated by* *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010)); Intervenor-appellants' Opening Brief, *supra* note 70, at 40-41 (citing *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 834 - 35 (9th Cir. 2002)).

<sup>120</sup> Opening Brief of the Federal Defendants-appellants, *supra* note 70, at 38 (citing *Westlands Water Dist. v. United States Dep't of the Interior*, 376 F.3d 853, 877 (9th Cir. 2004)); Intervenor-appellants' Opening Brief, *supra* note 70, at 40 (citing *Westlands Water Dist. v. United States Dep't of the Interior*, 376 F.3d 853, 877 (9th Cir. 2004)).

allowed phased coal-bed methane development to proceed,<sup>121</sup> while the NEPA violations were being cured. Additionally, in *High Sierra Hikers Association v. Blackwell*, 390 F.3d 630, 642-43 (9th Cir. 2004), the court considered economic impacts when it allowed packstock operations to continue *in spite* of a “likelihood of continued environmental injury.”<sup>122</sup> It seems, then, inapposite for the court to then deny a proposal that reduced the risk of contamination, or environmental injury, to a negligible amount while the EIS was prepared, while at the same time mitigating the impact to Monsanto and to the alfalfa farmers who desired to farm RRA.

Next, they argued that precedent indicates a high level of deference to an expert agency in its proposal for injunctive relief,<sup>123</sup> especially where the activity at issue is uniquely subject to the expertise of the agency, and even when the agency was the NEPA violator.<sup>124</sup> Ninth Circuit precedent in this area clearly favored acceptance of the agency’s proposal<sup>125</sup> where it represented a “fair and balanced”<sup>126</sup> approach to the interim relief needed until the NEPA process was properly completed. The district court’s rejection of the APHIS proposal flatly ignored its unequalled expertise in the understanding and management of genetically modified plants – a situation found to be reversible error in a similar situation in

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<sup>121</sup> Opening Brief of the Federal Defendants-appellants, *supra* note 70, at 38 (citing *Northern Cheyenne Tribe v. Norton*, 503 F.3d 836, 841, 846 (9th Cir. 2007)); Intervenor-appellants’ Opening Brief, *supra* note 70, at 40 (citing *Northern Cheyenne Tribe v. Norton*, 503 F.3d 836, 846 (9th Cir. 2007)).

<sup>122</sup> Opening Brief of the Federal Defendants-appellants, *supra* note 70, at 38 (citing *High Sierra Hikers Ass’n v. Blackwell*, 390 F.3d 630, 642-43 (9th Cir. 2004)); Intervenor-appellants’ Opening Brief, *supra* note 70, at 40 (citing *High Sierra Hikers Ass’n v. Blackwell*, 390 F.3d 630, 636 (9th Cir. 2004)).

<sup>123</sup> Opening Brief of the Federal Defendants-appellants, *supra* note 70, at 37-42; Intervenor-appellants’ Opening Brief, *supra* note 70, at 43-45.

<sup>124</sup> Intervenor-appellants’ Opening Brief, *supra* note 70, at 44 (citing *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 822-23, 830-32 (9th Cir. 2002), *abrogated by Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010)) (“This Court has held that deference to agency expertise is appropriate in precisely this context – the proposal of interim measures allowing challenged activity to proceed while the agency conducts additional environmental study mandated by NEPA.”)

<sup>125</sup> See *Geertson Farms v. Johanss*, 570 F.3d 1130, 1138-39 (9th Cir. 2009), *rev’d sub nom. Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010) (citing *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 831 (9th Cir. 2002), *abrogated by Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010)).

<sup>126</sup> *High Sierra Hikers Ass’n v. Blackwell*, 390 F.3d 630, 642-43 (9th Cir. 2004) (affirming district court injunction that “crafted a fair and balanced injunction that provided for interim relief for the environment pending compliance with NEPA and did not drastically curtail the packers’ operations.”).

another APHIS case.<sup>127</sup> In fact, they argued that the district court made faulty and inappropriate assumptions to support its decision<sup>128</sup>: one, that the RRA growers would violate the interim conditions;<sup>129</sup> and two, that APHIS would fail to enforce them.<sup>130</sup> The former was made in spite of the fact that the conditions would be enforceable not only by APHIS, but also through contractual requirements between Monsanto and the growers.<sup>131</sup> The latter was made as part of an inappropriate analogy, with the court stating that “having the authority and effectively using the authority are two different matters; the government has the authority to enforce the immigration laws, but unlawful entry into the United States still occurs.”<sup>132</sup> APHIS pointed out in its argument that the district court did not cast any doubt on the efficacy of the proposed measures – only in how the court assumed they would be executed.<sup>133</sup> The fact that the district court actually adopted the measures proposed by APHIS for the RRA already planted<sup>134</sup> supports the credibility of these measures and belies the court’s concerns for spread of contamination if they were used.

Finally, Monsanto promulgated the argument that the district court’s reach went too far, and improperly impinged on APHIS’s statutory authority.<sup>135</sup> They argued that a finding that APHIS had failed to take the “hard look” required by NEPA before issuing its unconditional deregulation of RRA, did not automatically mean that an EIS, as opposed to an EA, would be required to support any more limited decision regarding RRA that was within APHIS statutory authority to make.<sup>136</sup> The district court’s order, however, precluded any additional action regarding RRA until the EIS was completed. In addition to usurping APHIS authority, Monsanto argued that the court “essentially prejudged the merits of hy-

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<sup>127</sup> “The district court failed to abide by this deferential standard. Instead, the district court committed legal error by failing to respect the agency’s judgment and expertise.” *Ranchers Cattlemen Action Legal Fund Unitec Stockgrowers of Am. V. United States*, 415 F.3d 1078, 1093 (9th Cir. 2005).

<sup>128</sup> Opening Brief of the Federal Defendants-appellants, *supra* note 70, at 43-45; Intervenor-appellants’ Opening Brief, *supra* note 70, at 45.

<sup>129</sup> *Geertson Farms v. Johanns*, No. C 06-0175 CRB, 2007 WL 1302981 at \*5 (N.D. Cal. May 3, 2007), *aff’d* 570 F.3d 1130 (9th Cir. 2009), *rev’d sub nom.* *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010).

<sup>130</sup> *Id.*

<sup>131</sup> Opening Brief of the Federal Defendants-appellants, *supra* note 70, at 44.

<sup>132</sup> *Geertson*, 2007 WL 1302981 at \*5.

<sup>133</sup> Opening Brief of the Federal Defendants-appellants, *supra* note 70, at 45.

<sup>134</sup> *Geertson*, 2007 WL 1302981 at \*9.

<sup>135</sup> Intervenor-appellants’ Opening Brief, *supra* note 70, at 45-46.

<sup>136</sup> *Id.*

pothetical NEPA controversies not before the court and unripe for review.”<sup>137</sup>

The appellate court disposed of the appellants’ first two arguments rather quickly. In two paragraphs, the appellate court ignored years of precedent,<sup>138</sup> a firm trend to limit the scope of the injunctions as opposed to letting “equity” run amok,<sup>139</sup> and its own stated “considerable deference for factual and technical determinations implicating substantial agency expertise.”<sup>140</sup> The appellate court failed to find the appellant’s reliance on *Northern Cheyenne* and *Idaho Watersheds* compelling. They held that while *Northern Cheyenne* held that it was not an abuse of discretion to allow one method of development to proceed pending full compliance with NEPA, it did not mean that refusing to allow activity to proceed was an abuse of discretion.<sup>141</sup> As to *Idaho Watersheds*, the appellate court restated the circuit’s tendency to accord such deference in these types of cases, although emphasizing acceptance of such a proposal was not automatic.<sup>142</sup> After specifically stating that an “agency’s response may deserve deference,” and without saying whether or how the district court did so, the appellate court simply stated that the district court had not abused its discretion in rejecting the proposal.<sup>143</sup>

As to the last argument - addressing the court’s usurpation of APHIS authority - the appellate court chose not to respond to it. This was an argument, however, that as will be discussed in a later section, the United States Supreme Court would not ignore.

### C. Evidence? We Don’t Need No Stinking Evidence!

The last major contention on appeal was that the district court’s failure to hold an evidentiary hearing was also reversible error.<sup>144</sup> Although alluded to in APHIS’s arguments, mostly as to the cursory look given to its proposal by the district court,<sup>145</sup> this argument was primarily promul-

<sup>137</sup> *Id.* at 46.

<sup>138</sup> See *supra* text accompanying notes 119-122.

<sup>139</sup> See LAYCOCK, *supra* note 80 at 307-10, 333 (implying that there has been a shift in the Courts from doing equity until equity is done, back to the traditional rightful position standard).

<sup>140</sup> *Geertson Farms v. Johanns*, 570 F.3d 1130, 1138-39 (9th Cir. 2009), *rev’d sub nom.* *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010) (citing *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 833 (9th Cir. 2002), *abrogated by Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010)).

<sup>141</sup> *Id.* at 1138.

<sup>142</sup> *Id.* at 1138-39.

<sup>143</sup> *Id.* at 1139.

<sup>144</sup> *Id.*

<sup>145</sup> Opening Brief of the Federal Defendants-appellants, *supra* note 70, at 43.

gated by Monsanto.<sup>146</sup> The district court refused to evaluate the scientific evidence that supported APHIS's proposal because to do so would "require this court to engage in precisely the same inquiry it concluded APHIS failed to do."<sup>147</sup> Additional comments of the court<sup>148</sup> were also offered by Monsanto as indicative of the district court's clear "refusal to engage with the relevant evidence. . . ."<sup>149</sup> Monsanto pointed to *United States v. Microsoft Corp.*, 253 F.3d 34, 101 (D.C. Cir. 2001),<sup>150</sup> *Charlton v. Estate of Charlton*, 841 F.2d 988, 989 (9th Cir. 1988),<sup>151</sup> and *Huntington v. March*, 884 F.2d 648, 654 (2d Cir. 1989),<sup>152</sup> as normally requiring an evidentiary hearing before entering an injunction, especially where the facts are disputed.<sup>153</sup> *Idaho Watersheds*, in which no evidentiary hearing was held, was distinguished on the grounds that it was not necessary since the court deferred to and accepted the agency proposal.<sup>154</sup> Monsanto noted that the particular "novelty of the 'environmental' injury feared in this case"<sup>155</sup> made it especially important that the court hold a hearing "to determine whether gene transmission was both 'sufficiently likely' and 'irreparable,'" before rejecting the agency proposal.<sup>156</sup>

On the other hand, the plaintiff consortium argued that whether or not to hold an evidentiary hearing is within the court's broad discretion.<sup>157</sup>

<sup>146</sup> Intervenor-appellants' Opening Brief, *supra* note 70, at 46-49.

<sup>147</sup> *Geertson Farms v. Johanns*, No. C 06-0175 CRB, 2007 WL 1302981 at \*4 (N.D. Cal. May 3, 2007), *aff'd* 570 F.3d 1130 (9th Cir. 2009), *rev'd sub nom.* *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010).

<sup>148</sup> Such comments included: 1) "I'm not the person who has to look and analyze and try to figure out, does this have an environmental impact or doesn't it, you know, and all the measures and so forth.;" 2) "[B]alancing all of these different factors and coming to particular conclusions . . . isn't my job.;" and 3) indicating the court's job was to "stop things in its place until the government discharged its duty." Intervenor-appellants' Opening Brief, *supra* note 70, at 47 (citing ER. 61c-d).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 48; *United States v. Microsoft Corp.*, 253 F.3d 34, 101 (D.C. Cir. 2001) (en banc).

<sup>151</sup> Intervenor-appellants' Opening Brief, *supra* note 70, at 48; *Charlton v. Estate of Charlton*, 841 F.2d 988, 989 (9th Cir. 1988).

<sup>152</sup> Intervenor-appellants' Opening Brief, *supra* note 70, at 48; *Huntington v. March*, 884 F.2d 648, 654 (2d Cir. 1989).

<sup>153</sup> Intervenor-appellants' Opening Brief, *supra* note 70, at 48; *Charlton*, at 841 F.2d at 989 ("Only when the facts are not in dispute, or when the adverse party has waived its right to a hearing, can that significant procedural step be eliminated.").

<sup>154</sup> Intervenor-appellants' Opening Brief, *supra* note 70, at 48; *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 830-831 (9th Cir. 2002), *abrogated by* *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010).

<sup>155</sup> Intervenor-appellants' Opening Brief, *supra* note 70, at 48-49.

<sup>156</sup> *Id.* at 49.

<sup>157</sup> Plaintiff-Appellees' Answering Brief, *supra* note 74 at 65-69.

They pointed to the fact that the court had already held two hearings as to the scope of the permanent injunction,<sup>158</sup> and after acknowledging that it had “carefully reviewed the defendant’s voluminous evidence,” and the detailed nature of the declarations, nothing would be served by live testimony.<sup>159</sup> Finally, they highlighted the fact that none of the cases cited by Monsanto were NEPA cases, except *Idaho Watersheds*, which clearly held that failure to hold an evidentiary hearing was *not* an abuse of discretion.<sup>160</sup>

The appellate court’s decision marked a fine line between the competing positions. First, it acknowledged the general requirement for an evidentiary hearing prior to issuance of a permanent injunction, other than in cases where the hearing is properly waived, or where the facts are undisputed.<sup>161</sup> However, it distinguished NEPA violations from this requirement, as it is “not a typical permanent injunction.”<sup>162</sup> Because NEPA injunctions have as their purpose delineating interim procedures until NEPA is complied with, they are of a more limited purpose and duration than the typical injunction.<sup>163</sup> *Idaho Watersheds* was distinguished from the “normal injunctive setting” of *Microsoft* on the grounds that that the injunction would only be in place until the EIS was completed, at which the point the parties would have had an opportunity to input into the permanent measures that would be implemented,<sup>164</sup> and that a hearing would only duplicate that process, albeit with more limited input.<sup>165</sup> The appellate court majority denied the contention that *Idaho Watersheds* could be interpreted to stand for the proposition that the hearing was not required only when the agency’s proposal was accepted.<sup>166</sup>

The dissenting opinion, however, characterized the majority’s opinion on this matter as “creat[ing] an altogether new exception to the evidentiary hearing requirement we recognized in *Charlton*.”<sup>167</sup> Judge Smith found that *Charlton* set out only two exceptions to the evidentiary hearing requirement; undisputed facts or hearing waived by adverse party.<sup>168</sup>

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<sup>158</sup> *Id.* at 66.

<sup>159</sup> *Id.* at 67 (citing ER 20).

<sup>160</sup> *Id.* at 67-68.

<sup>161</sup> *Geertson Farms v. Johanns*, 570 F.3d 1130, 1139 (9th Cir. 2009), *rev'd sub nom.* *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010).

<sup>162</sup> *Id.* at 1139-1140.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 1140.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 1141 (Smith, J., dissenting).

<sup>168</sup> *Id.*; *Charlton v. Estate of Charlton*, 841 F.2d 988, 989 (9th Cir. 1988).

The majority acknowledged both that the facts underlying the injunction were disputed by the parties and that Monsanto specifically requested an evidentiary hearing.<sup>169</sup> Clearly, both exceptions recognized by *Charlton* were unavailable here. The dissent reasoned that the evidentiary hearing is critical to allow the court to assess the “witnesses’ credibility in the face of cross-examination,”<sup>170</sup> and is the step that “justifies the abuse of discretion standard of review under which we consider a district court’s decision to grant or deny injunctive relief.”<sup>171</sup> Judge Smith opined that when a district court skips that important step, the appellate court has exactly the same record on appeal and there is “no reason to afford the district court any discretion.”<sup>172</sup> He rested his dissent with the conclusion that “[t]here aren’t many environmental cases that don’t fit into the majority’s newly created exception. This is a mistake . . . .”<sup>173</sup> The Supreme Court did not address this issue,<sup>174</sup> and so, mistake or not, in the Ninth Circuit, it is now the law.

#### IV. INTERLUDE - AND THEN COMES *WINTER*

After the Ninth Circuit’s decision was issued, and while Monsanto and APHIS awaited a response to their petition for a rehearing and rehearing en banc, the Supreme Court decided *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008).<sup>175</sup> *Winter* involved the Navy’s failure to prepare an EIS in accordance with NEPA before conducting training exercises, and was brought by plaintiffs contending that their scientific, recreational and ecological interests would be harmed by injury to marine mammals caused by the Navy’s use of active sonar during the training.<sup>176</sup> Among other findings, the District Court and the Ninth Circuit held that a “possibility” of irreparable harm was sufficient to support a preliminary injunction where the plaintiff demonstrated a strong likelihood of prevailing on the merits.<sup>177</sup> The Navy appealed, asserting that a likelihood of irreparable injury, not a mere possibility, was

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<sup>169</sup> *Geertson*, 570 F.3d at 1139.

<sup>170</sup> *Id.* at 1143 (Smith, J., dissenting).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743, 2762 (2010).

<sup>175</sup> See Brief for Petitioners at 19-21, *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010) (No. 09-475). See generally *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008).

<sup>176</sup> *Winter*, 555 U.S. at 370-371.

<sup>177</sup> *Id.* at 375.

required to support an injunction.<sup>178</sup> The United States Supreme Court agreed with the Navy, stating that “the Ninth Circuit’s ‘possibility’ standard is too lenient,” and required that irreparable injury be “likely in the absence of an injunction.”<sup>179</sup>

Monsanto and APHIS brought *Winter’s* holding to the Ninth Circuit’s attention with no success.<sup>180</sup> Although Monsanto pointed out that the District Court had specifically employed the mere “possibility of irreparable harm” standard,<sup>181</sup> the Ninth Circuit denied a rehearing and prohibited additional petitions for rehearing.<sup>182</sup> Instead, the Ninth Circuit issued an amended opinion that, in response to the Supreme Court decision, simply added a citation to *Winter* to its determination that “the plaintiffs had established that genetic contamination was *sufficiently likely* to occur so as to warrant broad injunctive relief.”<sup>183</sup> This sentence was unchanged from the original opinion,<sup>184</sup> although the Ninth Circuit’s standard for “sufficiently likely” surely was changed by the *Winter* decision – a fact that Monsanto pointed out in its Petition to the United States Supreme Court.<sup>185</sup>

## V. THE SUPREME COURT OPINION

For those who only followed this case through the court documents and published opinions, the direction of the Supreme Court decision probably came as a surprise. Thirty percent of the majority opinion was devoted to addressing issues of standing.<sup>186</sup> Next, although the Supreme Court both reiterated and applied the *eBay* test to the case at hand,<sup>187</sup> the court seemed to have something else on its mind. Although both sides’ arguments addressed the issues of application of the proper legal standard, whether there was, or was not, irreparable harm, and whether an

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<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> See Brief for Petitioners, *supra* note 175 at 20-21.

<sup>181</sup> See *id.* at 41.

<sup>182</sup> *Geertson Farms v. Johanns*, 570 F.3d 1130, 1133 (9th Cir. 2009), *rev’d sub nom.* *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010) (“The petition for panel rehearing and rehearing en banc is DENIED. No further petitions for rehearing will be accepted.”).

<sup>183</sup> *Id.* at 1137 (emphasis added).

<sup>184</sup> Compare *Geertson*, 570 F.3d at 1137, with *Geertson Farms v. Johanns*, 541 F.3d 938, 945, amended by *Geertson Farms v. Johanns*, 570 F.3d 1130 (9th Cir. 2009), *rev’d sub nom.* *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010).

<sup>185</sup> Brief for Petitioners, *supra* note 175 at 41.

<sup>186</sup> See *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743, 2752-56 (2010).

<sup>187</sup> *Id.* at 2756, 2758.

evidentiary hearing was required,<sup>188</sup> the Court looked at the issue from a different perspective: In light of the court-ordered vacatur, was any injunction even necessary?<sup>189</sup> It also addressed the question the Ninth Circuit neglected<sup>190</sup>: Did the injunction usurp the authority of APHIS granted to it by Congress?<sup>191</sup>

#### A. *Standing – A New Standard?*

Standing is the right, under the law, to seek the court's review or enforcement of the issue at hand.<sup>192</sup> Standing requires that "an injury be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling."<sup>193</sup> Both sides attacked the other's standing in this case – Monsanto's standing to appeal, since APHIS abandoned the case,<sup>194</sup> and the plaintiffs' standing to bring the initial case.<sup>195</sup> Both attacks resulted in new nuances to the issue of standing.

The plaintiff consortium challenged Monsanto's ability to seek Supreme Court review, arguing that because Monsanto did not specifically challenge the vacatur, they cannot then challenge a part of the District Court's order, specifically the injunction, which only injures them in the same way as the vacatur.<sup>196</sup> They contended that the practical effect of the vacatur was to restore RRA to a regulated article, thus banning growth and sale, which is what the injunction also did.<sup>197</sup> Additionally, they argued that the restriction on APHIS's ability to partially deregulate RRA is not an actual or imminent harm because APHIS would have to prepare an EA, and the EA would have to come out in favor of partial deregulation.<sup>198</sup> Since Monsanto could not prove that each of these events would

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<sup>188</sup> See generally Brief for Petitioners, *supra* note 175; Brief for Respondents, *supra* note 30.

<sup>189</sup> *Monsanto*, 130 S.Ct. at 2761.

<sup>190</sup> See *Geertson Farms v. Johanns*, 570 F.3d 1130 (9th Cir. 2009), *rev'd sub nom. Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010).

<sup>191</sup> *Monsanto*, 130 S.Ct. at 2757-61.

<sup>192</sup> "A party's right to make a legal claim or seek judicial enforcement of a duty or right." BLACK'S LAW DICTIONARY 671 (3d pocket ed. 2006).

<sup>193</sup> *Monsanto*, 130 S.Ct. at 2752.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 2754.

<sup>196</sup> Brief for Respondents, *supra* note 30 at 21-22.

<sup>197</sup> *Id.*

<sup>198</sup> Transcript of Oral Argument at 39-40, *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010) (No. 09-475).

occur, the harm was “too speculative to support the actual or imminent injury requirement” to find standing.<sup>199</sup>

The Court found several reasons why these arguments failed. First, Monsanto had always contended that APHIS’s proposed injunction should have replaced the vacated deregulation decision,<sup>200</sup> and this objection had been adequately preserved.<sup>201</sup> Next, Monsanto was harmed by the District Court’s decision not to implement APHIS’s injunction, which would have allowed continued sale and planting of RRA, subject to the restrictions proposed.<sup>202</sup> Finally, the District Court’s order went beyond the vacatur by enjoining partial deregulation, which independently harmed Monsanto by eliminating the clear likelihood demonstrated by APHIS that it would partially deregulate RRA if not for the District Court’s order, since that is exactly what it proposed to do originally.<sup>203</sup> The Court, however, declined to decide “whether or to what extent a party challenging an injunction that bars an agency from granting certain relief must show that the agency would be likely to afford such relief if it were free to do so.”<sup>204</sup> It found it was not necessary in this case due to the overwhelming evidence of the APHIS’s determination that deregulation within the proposed limits was in the public interest,<sup>205</sup> leaving open the question of how much is enough. Since the plaintiff consortium conceded at oral argument that a favorable decision by the Supreme Court would redress Monsanto’s injury,<sup>206</sup> Monsanto was held to have standing.<sup>207</sup>

Monsanto, on the other hand, argued that none of the named plaintiff consortium members were shown to be “likely to suffer a constitutionally cognizable injury absent injunctive relief.”<sup>208</sup> They attacked using this offensive on two fronts. The first was that the basis for the plaintiffs’ claims, and the Ninth Circuit’s assessment of the basis of their claims, was the *fear* of cross-contamination.<sup>209</sup> Monsanto asserted that precedent does not recognize risk of harm as a cognizable injury under NEPA.<sup>210</sup> Secondly, they argued that even if there was a cognizable injury, the

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<sup>199</sup> *Id.*; *Monsanto*, 130 S.Ct. at 2753.

<sup>200</sup> *Monsanto*, 130 S.Ct. at 2753.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 2752.

<sup>203</sup> *Id.* at 2754.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> Transcript of Oral Argument, *supra* note 198 at 38; *Monsanto*, 130 S.Ct. at 2754.

<sup>207</sup> *Monsanto*, 130 S.Ct. at 2754.

<sup>208</sup> *Id.*

<sup>209</sup> Brief for Petitioners, *supra* note 175, at 40.

<sup>210</sup> *Id.*

plaintiffs had not established that *they* would likely suffer it.<sup>211</sup> Pointing out that the plaintiff consortium was not “a class of alfalfa farmers, nor are they vested by law with authority to represent the interests of alfalfa itself . . . ,”<sup>212</sup> Monsanto claimed that the plaintiff’s could not prevail by showing “that some farmer somewhere might be forced to endure a low level of RRA in his fields,”<sup>213</sup> and could only “seek relief for irreparable injuries they *themselves* are likely to suffer.”<sup>214</sup>

The Court was not persuaded by Monsanto’s arguments either. It found that even if the plaintiff farmers’ alfalfa was never contaminated by the Roundup Ready® gene, the harms of performing additional testing, providing protective measures and contracting with foreign growers to ensure the purity of conventional alfalfa seed were “sufficiently concrete to satisfy the injury-in-fact prong of the constitutional standing analysis.”<sup>215</sup> Attributing these harms to APHIS’s deregulation decision,<sup>216</sup> and finding that a judicial order enjoining the growth or sale of RRA would remedy their injuries,<sup>217</sup> they held that the plaintiffs also have standing.<sup>218</sup> Monsanto contended that the plaintiff alfalfa farmers also failed to meet the “zone of interests” test used as a prudential standing requirement in cases challenging agency compliance with particular statutes,<sup>219</sup> specifically arguing that protection against the risk of commercial harm was “not an interest that NEPA was enacted to address.”<sup>220</sup> However, they noted that the District Court found that the plaintiffs’ injury had an environmental component that Monsanto did not appeal.<sup>221</sup> The fact that the plaintiffs sought to avoid economic harms caused by the risk of contamination, did not remove prudential standing.<sup>222</sup>

These holdings introduced some new nuances, and new questions, to the issue of standing. First, it opens the door for a non-governmental entity who can demonstrate that their ability to seek action from a governmental agency statutorily authorized to perform the action was im-

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<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 40-41.

<sup>214</sup> *Id.* at 40.

<sup>215</sup> *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743, 2754-55 (2010).

<sup>216</sup> *Id.* at 2755.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> Reply Brief for Petitioners at 11-12, *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010) (No. 09-475).

<sup>220</sup> *Id.*

<sup>221</sup> *Monsanto*, 130 S.Ct. at 2756.

<sup>222</sup> *Id.*

pacted by an injunction to appeal the decision, even when the government declines to appeal.<sup>223</sup> Although the court declined to establish a standard for how likely it is that the government agency would take the action without the injunction,<sup>224</sup> it seems conclusive that when a reasonable agency proposal for injunctive relief is not accepted, it can be inferred that such action would be granted if the agency was not enjoined from doing so.<sup>225</sup>

Next, actual costs incurred to protect oneself from the risk of injury can be found to satisfy the injury-in-fact requirement for standing.<sup>226</sup> This could certainly add an extra dimension to the injury prong of the standing analysis. The court's statement opens the door to plaintiffs who are neither harmed, nor imminently to be harmed, but subject to some, as yet undefined, level of risk of harm where they incur some cost to mitigate or identify the risk.<sup>227</sup> How wide the door has been opened is yet to be determined, although in this case the actual risk was hotly debated all the way to the Supreme Court, with both sides producing expert declarations showing the risk was either negligible or high.<sup>228</sup> It can be presumed from the results of this case, that hotly debated or not, where a district court finds a "reasonable probability"<sup>229</sup> of harm, even without an evidentiary hearing, their costs to mitigate that risk are enough to constitute injury-in-fact for the purposes of standing.

### B. "Run of the Mill" Revisited

The Court began its analysis of the propriety of the injunction by restating the *eBay* standard four factor test.<sup>230</sup> It then proceeded to restate Monsanto's argument that the lower courts used "pre-*Winter* Ninth Circuit precedent" that an injunction was proper in the "run of the mill

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<sup>223</sup> APHIS did not join Monsanto in its petition for certiorari – in fact, they opposed it. See Brief for the Federal Respondents in Opposition, *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 1133 (2010) (*cert. granted*). However, APHIS provided a brief supporting Monsanto after certiorari was granted. See Reply Brief for the Federal Respondents Supporting Petitioners, *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010).

<sup>224</sup> *Monsanto*, 130 S.Ct. at 2754.

<sup>225</sup> See *id.*

<sup>226</sup> See *id.* at 2755.

<sup>227</sup> See *id.*

<sup>228</sup> See generally Brief for Petitioners, *supra* note 175; Brief for Respondents, *supra* note 30.

<sup>229</sup> The Supreme Court found that the District Court had found that the plaintiffs had established a "reasonable probability" of contamination. *Monsanto*, 130 S.Ct. at 2754.

<sup>230</sup> *Id.* at 2756.

NEPA case” until the NEPA violation was corrected.<sup>231</sup> It also noted the District Court and Court of Appeal’s reliance on *National Parks* that “in unusual circumstances, an injunction may be withheld, or more likely, limited in scope,”<sup>232</sup> as its introduction to the lesson at hand. The court appeared to chastise the Ninth Circuit for its improper “presum[ption] that an injunction is the proper remedy for a NEPA violation except in unusual circumstances.”<sup>233</sup> They went on to note that the use of the above statements to “guide the determination of whether to grant injunctive relief . . . invert[s] the proper mode of analysis.”<sup>234</sup> The Court further brought the Ninth Circuit to task by finding that a “perfunctory recognition that ‘an injunction does not automatically issue’ in NEPA cases,” while all analysis is to the contrary, does not cure the defect.<sup>235</sup>

Although it noted the “lower court’s apparent reliance on the incorrect standard set out in the pre-*Winter* Circuit precedents quoted,”<sup>236</sup> the court declined to decide the plaintiff consortium’s contention that the lower courts did apply the proper four-factor test, and the statements regarding NEPA cases were “descriptive, rather than prescriptive.”<sup>237</sup> Instead, the Court issued a clear admonition to the Ninth Circuit to recognize that even in NEPA cases, it is “not enough for a court . . . to ask whether there is a good reason why an injunction should *not* issue; rather, a court must determine that an injunction *should* issue,” using the four-factor test from *eBay*,<sup>238</sup> and then moved on to decide the case on other grounds.<sup>239</sup>

### C. And Now, the Rest of the Story

The largest portion of the decision dealt with whether enjoining APHIS from any partial deregulation of RRA was improper,<sup>240</sup> an argument that Monsanto had made to the Ninth Circuit without response.<sup>241</sup> A smaller portion then addressed whether, in light of the vacatur, any

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 2757 (quoting *Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 737 n.18 (9th Cir. 2001), *abrogated* by *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010) (internal quotation marks omitted).

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 2757-2762.

<sup>240</sup> *See id.* at 2757-2761

<sup>241</sup> Intervenor-appellants’ Opening Brief, *supra* note 70, at 45-46. *See Geertson Farms v. Johanns*, 570 F.3d 1130 (9th Cir. 2009), *rev’d sub nom. Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010).

injunction against sale or growth was even necessary<sup>242</sup> – an idea that may have been inadvertently planted by the plaintiffs themselves.<sup>243</sup> Deciding these two issues in favor of Monsanto,<sup>244</sup> the Court saw no need to then delve into whether the District Court was required to conduct an evidentiary hearing prior to issuing an injunction, leaving that question open and undecided.<sup>245</sup>

*I. No EIS = No RRA. Incorrect!*

Although Monsanto was focusing their challenge on the portion of the order prohibiting the planting of RRA,<sup>246</sup> the Court noted that the injunction against planting could not stand if the injunction against partial deregulation was improper, and began their analysis there.<sup>247</sup> Since the plain text of the District Court's order prohibited any partial deregulation, not just that detailed in APHIS's proposed judgment,<sup>248</sup> it foreclosed any valid exercise of APHIS's statutory authority.<sup>249</sup> In this case, the farmers and environmental groups brought suit challenging the specific agency order of APHIS to deregulate RRA *completely*.<sup>250</sup> The District Court's finding that the deregulation decision was procedurally defective for want of an EIS went without objection by APHIS.<sup>251</sup> APHIS's proposal was an attempt to "streamline" the process to essentially approve a partial deregulation of RRA while the EIS for complete deregulation was accomplished,<sup>252</sup> putting the District Court in an "unenviable position" of having to decide between mountains of conflicting expert evidence.<sup>253</sup>

The Court found that "[t]he District Court may well have acted within its discretion in refusing to craft a judicial remedy that would have *authorized* the continued planting and harvesting of RRA while the EIS is being prepared."<sup>254</sup> However, that did not mean that enjoining APHIS from exercising its authority vested by law to pursue a partial deregula-

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<sup>242</sup> *Monsanto*, 130 S.Ct. at 2761.

<sup>243</sup> The idea that the injunction had no effect beyond that of the vacatur was introduced by the plaintiffs in their brief to the Supreme Court. Brief for Respondents, *supra* note 30, at 21-22.

<sup>244</sup> *Monsanto*, 130 S.Ct. at 2761.

<sup>245</sup> *Id.* at 2762.

<sup>246</sup> *Id.* at 2757 n.4.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 2757.

<sup>249</sup> *See id.* at 2758.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

tion, whether identical to, or different from, that proposed to the District Court, was a proper exercise of the court's authority.<sup>255</sup> The Court found it possible that APHIS could find, on the basis of a new EA, that some form of deregulation was appropriate before the EIS for complete deregulation was completed.<sup>256</sup> If and when APHIS made any kind of partial deregulation decision, any party aggrieved by such a decision, could challenge it much like this decision was challenged.<sup>257</sup> Since APHIS had not exercised its authority to partially deregulate RRA, any judicial review of any decision other than the decision to completely deregulate was premature.<sup>258</sup>

The Court also found that the injunction could not be "justified as a prophylactic measure needed to guard against the possibility that the agency would seek to effect on its own the particular partial deregulation scheme embodied in the terms of APHIS's proposed judgment."<sup>259</sup> Recognizing that the District Court need not adopt APHIS's plan,<sup>260</sup> it should not have stopped APHIS from partially deregulating "in accordance with the procedures established by law."<sup>261</sup> Additionally, the order did not just enjoin this particular partial deregulation, but any and all proposals, including those with no likelihood of adverse affect to the environment or the plaintiffs.<sup>262</sup> Finding the District Court's order internally inconsistent, it concluded that if the District Court was right in finding that "any partial deregulation, no matter how limited, required an EIS," then the District Court's own decision to allow limited planting and harvesting by the third-party farmers who had already done so also required an EIS.<sup>263</sup> The converse, of course, would also be true.<sup>264</sup>

Concluding that the order enjoining all deregulation did not satisfy the four-factor test for permanent injunctive relief,<sup>265</sup> the court specifically addressed the issue of irreparable injury.<sup>266</sup> First, they found that if and when APHIS made a partial deregulation decision that violates NEPA, the parties can challenge such an action and seek appropriate relief.<sup>267</sup> A

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 2759.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at 2760-61.

<sup>267</sup> *Id.* at 2761.

permanent injunction was “not now needed to guard against any present or imminent risk of likely irreparable harm.”<sup>268</sup> Second, they found that “a partial deregulation need not cause respondents any injury at all, much less irreparable injury,” under the right deregulation conditions.<sup>269</sup> Since the plaintiff consortium did not represent a class,<sup>270</sup> it would be difficult for them to show how a carefully crafted limited deregulation would cause them any injury.<sup>271</sup> Finding that the order pre-empted the agency process and authority vested in it by law, the injunction barring any deregulation prior to the EIS was found to be in error.<sup>272</sup>

## 2. *One Vacatur = No Injunction Necessary*

The Supreme Court concluded that the portion of the order barring future sale and planting of RRA was in error for two main reasons.<sup>273</sup> The first rested on the invalidity of the injunction against any partial deregulation.<sup>274</sup> With that decision in error, it necessarily followed that any proper partial deregulation decision made by APHIS prior to the EIS would be thwarted by the additional restriction on any sale and planting, even those in compliance with such a decision.<sup>275</sup> It was therefore inappropriate to enjoin the parties from “acting in accordance with the terms of such a deregulation decision.”<sup>276</sup>

The second was based on the representations of the plaintiffs that the injunction had no meaningful effect independent of the vacatur,<sup>277</sup> an argument they used to attack Monsanto's standing. The argument was that the vacatur, which returned RRA to a regulated article, had the practical effect of independently prohibiting the growth and sale of almost all RRA, until such time as another decision by APHIS was promulgated.<sup>278</sup> The Court took this argument one step further than the plaintiffs anticipated. Since injunctions are a “drastic and extraordinary remedy, which should not be granted as a matter of course,” and “if a less drastic remedy (such as partial or complete vacatur of APHIS's deregulation deci-

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<sup>268</sup> *Id.* at 2760.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* at 2758, 2760-61.

<sup>273</sup> *Id.* at 2761.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> Brief for Respondents, *supra* note 30, at 21.

sion) was sufficient to redress respondent's injury, no recourse to the additional and extraordinary relief of an injunction is warranted."<sup>279</sup>

### 3. Victory for . . . whom actually?

Both Monsanto and the plaintiff consortium walked away from the battle claiming victory.<sup>280</sup> For Monsanto, the victory seemed to be clear – they were successful in overturning the injunctions against partial deregulation and future planting of RRA.<sup>281</sup> However, Monsanto's victory in court was technical, at best. Because the vacatur still stood, no new RRA could be sold or grown.<sup>282</sup> Although leaving Monsanto free to petition APHIS for a partial deregulation prior to the EIS being completed, the Court made it clear that any procedural deviation would mean the issue would likely be back before a court again.<sup>283</sup> At the time of the Supreme Court decision in July of 2010, it was expected that the EIS would be completed in the spring of 2011.<sup>284</sup> APHIS actually completed the EIS in December 2010, paving the way for sales to resume in early 2011.<sup>285</sup> Monsanto's true victory was not won in the courts, but in the administrative offices of APHIS through the preparation of the EIS.<sup>286</sup>

The plaintiff consortium members could also claim a legitimate victory in the battle. Although they lost the injunctions regarding partial deregulation and ban on sales and planting,<sup>287</sup> the vacatur was upheld and the court finding that NEPA was violated was not reversed.<sup>288</sup> Additionally, the Supreme Court expressly acknowledged that the economic consequences occurring as a result of environmental impacts are legitimate harms in NEPA cases,<sup>289</sup> staving off future standing arguments in GMO cases where the risk of cross-contamination is *reasonably probable*<sup>290</sup> and potentially opening the door to new plaintiffs in the environmental arena.

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<sup>279</sup> *Monsanto*, 130 S.Ct. at 2761.

<sup>280</sup> *Monsanto v. Geertson Seed Farms: The Supreme Court Alfalfa Decision*, COOKINGUPASTORY.COM, <http://cookingupastory.com/monsanto-v-geerston-seed-farms-the-supreme-court-alfalfa-decision> (last visited Feb. 4, 2011) [hereinafter *Alfalfa Decision*].

<sup>281</sup> *Id.*

<sup>282</sup> *Monsanto*, 130 S.Ct. at 2761.

<sup>283</sup> *Id.* at 2760; *Alfalfa Decision*, *supra* note 280.

<sup>284</sup> Leslie, *supra* note 5.

<sup>285</sup> News Release No. 0035-11, U.S. Dep't of Agric., USDA Announces Decision to Fully Deregulate Roundup Ready Alfalfa (Jan. 27, 2011), available at <http://usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=2011/01/0035.xml>

<sup>286</sup> *See id.*

<sup>287</sup> *See Monsanto*, 130 S.Ct. at 2761; *Alfalfa Decision*, *supra* note 280.

<sup>288</sup> *See generally Monsanto*, 130 S.Ct. at 2761.

<sup>289</sup> *Id.* at 2755; *Alfalfa Decision*, *supra* note 280.

<sup>290</sup> *Monsanto*, 130 S.Ct. at 2754.

Although the putative losers in the Supreme Court,<sup>291</sup> the acceptance of economic harms in environmental litigation could have far-reaching effects to the benefit of those pursuing environmental litigation and to the detriment of defendants like Monsanto.

The entity emerging from this battle with the most scars is arguably the Ninth Circuit. Known for its almost unchecked tendency to find in favor of plaintiffs in environmental litigation,<sup>292</sup> the Circuit is now on notice that environmental injunctive relief will not be allowed any special treatment.<sup>293</sup> Without diluting environmental concerns or undercutting NEPA, the Supreme Court was clear that injunctive relief in the environmental context was neither a given, nor would it be given special treatment by the courts.<sup>294</sup> While directing its comments to the Ninth Circuit, the decision acts as a warning to apply a consistent standard through all the Circuits. Through this case, it also seemed to imply that, rather than an injunction as so long presumed by the Ninth Circuit, the proper relief in many NEPA cases might simply be the vacatur of the improperly made decision, with remand to the agency to reexamine using proper NEPA procedures.<sup>295</sup>

## VI. SO WHAT IS THE BIG DEAL?

*Monsanto v. Geertson* could have been the landmark case dealing with GMOs in the United States. The concerns involving cross-contamination of genetically engineered crops in light of the growing organic movement will only become more widespread as other companies follow Monsanto's lead into the field. Like so many other groundbreaking discoveries, GMO crops could either be the environmental "threat" that never materializes, or the wonder-crops for which the negative impact is only known years later. However, each side in the debate has legitimate research and arguments supporting its side. GMO crops are now plentiful,<sup>296</sup> improving ease of growth and management,<sup>297</sup> and there has been

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<sup>291</sup> See *id.* at 2761.

<sup>292</sup> See Tony Mauro, *Court gives 6th Circuit the 9th Circuit treatment*, THE NAT'L L. J., Jun. 2, 2010, [http://www.law.com/jsp/nlj/legaltimes/PubArticleLT.jsp?id=1202459039355&Court\\_gives\\_th\\_Circuit\\_the\\_th\\_Circuit\\_treatment&slreturn=1&hbxlogin=1](http://www.law.com/jsp/nlj/legaltimes/PubArticleLT.jsp?id=1202459039355&Court_gives_th_Circuit_the_th_Circuit_treatment&slreturn=1&hbxlogin=1).

<sup>293</sup> See *Monsanto*, 130 S.Ct.at 2756-57.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* at 2761.

<sup>296</sup> *Adoption of Genetically Engineered Crops in the U.S.*, ERS/USDA DATA, <http://www.ers.usda.gov/Data/BiotechCrops/> (last visited Feb. 4, 2011). See NAT'L AGRICULTURE STATISTICS SERVICE, ACREAGE 24-25 (2010); GENERAL ACCOUNTING OFFICE, GENETICALLY MODIFIED FOODS: EXPERTS VIEW REGIMEN OF SAFETY TESTS AS ADEQUATE, BUT FDA'S EVALUATION PROCESS CAN BE ENHANCED 6 (2002).

no known risk to human or livestock for those that have been through the extensive testing that APHIS and other governmental agencies require.<sup>298</sup> Such advancements provide source crops for innovative usages other than just human and livestock consumption.<sup>299</sup>

On the other hand, the organic industry enjoys growing popularity among consumers,<sup>300</sup> and the risk of cross-contamination, while arguably manageable under the same processes used by farmers for many years to protect against cross-contamination of differing varieties and species,<sup>301</sup> is real, even when slight.<sup>302</sup> At some point, the question of whether the right to farm one crop of any type is more important than that of another that can cross-pollinate with the first, whether GMO or conventional, must be decided. And although hoped for through this case, it is perhaps wise that the Supreme Court left this decision to the industry and the legislature to work out on their own.

Instead, the Supreme Court decided to rule on the case on primarily procedural grounds.<sup>303</sup> In addition to the general issues of GMOs above, the other questions that the case failed to answer, and those that the decision introduced on its own, however, are enough to keep legal scholars occupied for some time to come.

First, the case opened the door to an expanded plaintiff class by holding that economic costs to mitigate the risk of possible environmental injury were enough to establish an injury for standing without establishing parameters of how likely the risk must be found to be.<sup>304</sup> Next, the court also found that a non-governmental entity could appeal an order enjoining a governmental agency from acting if they were harmed by the governmental agency's inability to act.<sup>305</sup> However, the court left the lower courts no guidance as to what showing the non-governmental entity must make as to whether, or how likely it is that, the agency would take the action in the absence of the injunction.<sup>306</sup> Finally, the court failed to address the important question posed to it of whether evidentiary hearings are required prior to issuing a permanent injunction in

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<sup>297</sup> See, e.g., *Alfalfa*, *supra* note 9.

<sup>298</sup> GENERAL ACCOUNTING OFFICE, *supra* note 296 at 2-3.

<sup>299</sup> Such usages could include production of ethanol and plant-based textiles.

<sup>300</sup> Anne Fitzgerald, *Organic's Popularity Outpaces Production*, DES MOINES REG., Nov. 20, 2005, at M1, available at <http://www.organicconsumers.org/organic/outpace120115.cfm>.

<sup>301</sup> See Intervenor-appellants' Opening Brief, *supra* note 70, at 17.

<sup>302</sup> See Opening Brief of the Federal Defendants-appellants, *supra* note 70, at 19.

<sup>303</sup> See *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743, 2762 (2010).

<sup>304</sup> *Id.* at 2755-56.

<sup>305</sup> *Id.* at 2754.

<sup>306</sup> *Id.*

NEPA cases, where the court does not accept the agency's proposal for injunctive relief.<sup>307</sup>

A legitimate argument in the GMO cross-contamination context, at least as to the farmer plaintiffs, was never addressed in any decision or brief – the adequacy of legal damages. In this case, the plaintiffs introduced two main concerns in their complaint. The first was that conventional and organic alfalfa seed might become contaminated with the GM gene.<sup>308</sup> They claimed this would result in increased costs for testing to validate the purity of the seed for their consumers,<sup>309</sup> and also the loss of export markets where GM products are either banned or undesired.<sup>310</sup> Supporting claims were made that the spread of genetically engineered alfalfa will make it more difficult for persons concerned about GM products to produce, sell and eat meat, dairy and honey that is not contaminated by genetically engineered materials.<sup>311</sup> Finally, the plaintiffs claimed that introduction of RRA into the environment would cause proliferation of glyphosate tolerant weeds and feral alfalfa,<sup>312</sup> requiring more environmentally damaging techniques to remove them and thus injuring their recreational and aesthetic enjoyment of their property and the environment.<sup>313</sup> The merit of these claims was never really reached; the court decided the case solely on the failure of APHIS to perform an EIS and, although touched on during the remedy phase, was not decided as part of the adversarial process.<sup>314</sup>

An argument can be made that the main claim can be adequately compensated by money damages, if it was to actually occur, to restore the plaintiff to the rightful position. Loss of sale of a crop due to contamination, and of the profits to be made in a particular market, can be calculated and awarded to the farmer incurring them. The costs to create protective measures, or to replant with uncontaminated seed, are calculable, and keep the loss from recurring. There is an argument that the remaining claims are not even justiciable – is the loss of the ability to obtain a product in this situation, or having to obtain one at a higher cost, a cause

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<sup>307</sup> *Id.* at 2762.

<sup>308</sup> First Amended Complaint for Declaratory and Injunctive Relief, *supra* note 26 at 29.

<sup>309</sup> *Id.* at 30-31.

<sup>310</sup> *Id.* at 31-32.

<sup>311</sup> *Id.* at 29-31.

<sup>312</sup> *Id.* at 28-29.

<sup>313</sup> *Id.* at 29.

<sup>314</sup> *Geertson Seed Farms v. Johanns*, No. C 06-0175 CRB, 2007 WL 518624 at \*12 (N.D. Cal. Feb. 13, 2007).

The lack of adversarial process was based on the failure of the court to hold an evidentiary hearing. *Geertson Farms v. Johanns*, 570 F.3d 1130, 1139-41 (9th Cir. 2009), *rev'd sub nom.* *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010).

of action? Such a situation could occur even if there was no possibility of contamination, if all, or almost all, alfalfa farmers elected to switch to farming RRA, in lieu of conventional or organic alfalfa. Additionally, glyphosate-tolerant weeds generally occur due to repeated exposure to glyphosate, which has been in use for over 35 years.<sup>315</sup> Causation could be extremely difficult to establish, and would be analogous to suing someone for a drug-resistant strain of a bacterium or virus developing from the use of a common vaccine or treatment. These are major issues and arguments underlying the entire issue of genetically modified crops, resurfacing time and again,<sup>316</sup> that both the defendants and the court chose to defer to the next similar controversy.

That next controversy could be another Monsanto case – *Center for Food Safety v. Vilsack* – dealing with Roundup Ready® sugar beets.<sup>317</sup> The District Court ordered the uprooting of sugar beet seedlings planted under restricted permits issued by APHIS in September 2010 after an August 2010 vacatur of APHIS’s deregulation order based on its failure to prepare an EIS that encompassed the entire life cycle of the GMO sugar beet.<sup>318</sup> The order, citing to *Winter* and avoiding all references to “run of the mill NEPA cases,”<sup>319</sup> was stayed by the Ninth Circuit pending appeal, giving both sides, and the Ninth Circuit, time to absorb the impact of *Monsanto v. Geertson* to the litigation.<sup>320</sup> The decision of the Ninth Circuit was watched by many.

In February of 2011, the appellate court issued its opinion.<sup>321</sup> Finding that the plaintiffs had not met *Winter* by establishing a likelihood of genetic contamination or other irreparable harm from the permitted seedlings in the absence of preliminary relief, they reversed the lower court’s decision.<sup>322</sup> Noting that the narrow question of “whether the district court abused its discretion by ordering the destruction of certain permitted juvenile Roundup Ready sugar beet plants” arose in context of broader

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<sup>315</sup> *Glyphosate/Round-up Spraying*, *supra* note 7; *Who We Are, Company History*, *supra* note 6.

<sup>316</sup> See Ennesser, *supra* note 3.

<sup>317</sup> *Ctr. for Food Safety v. Vilsack*, No. C 10-04038 JSW, 2010 WL 4869117 (N.D. Cal. Dec. 1, 2010) (stayed pending appeal).

<sup>318</sup> *Id.* at \*8-9.

<sup>319</sup> See *Id.* at \*1-11.

<sup>320</sup> *Order to Uproot Sugar Beet Seedlings Stayed by Appellate Court*, MONSANTO.COM, <http://www.monsanto.com/newsviews/Pages/order-to-uproot-sugar-beet-seedlings-stayed-by-appellate-court.aspx> (last visited Jan.30, 2011); *Alfalfa Decision*, *supra* note 280.

<sup>321</sup> *Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166 (9th Cir. 2011), No 10-17719, 10-17722, 2011 WL 676187, at \*1 (9th Cir. Feb. 25, 2011) (pincites only available in parallel citation at time of submission to printer).

<sup>322</sup> *Id.* at \*5, 7.

litigation,<sup>323</sup> and careful to not “express[ ] any views on the merits of the ultimate issues in th[e] case,”<sup>324</sup> the court acknowledged that APHIS’s permitting of the stecklings followed the blueprint of limited deregulation that would not constitute irreparable injury as suggested by the Supreme Court in *Monsanto*.<sup>325</sup>

## VII. CONCLUSION

*Monsanto v. Geertson* was at once both something of a let-down and a precedent setting decision. The case introduced nuances to the issue of standing that will likely take years to fully explore and define. It attempted to rein in the liberal leanings of the lower courts, especially that of the Ninth Circuit, as involves environmental litigation and warned the courts not to step any further than necessary into the lawful activities of the executive branch. However, the contentious issues underlying all the litigation involving GMO crops remains unresolved, and to those on both sides of the debate eagerly waiting to see on which side the high court will land on these issues once and for all, disappointment is the only seed that has been sown.

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<sup>323</sup> *Id.* at \*2.

<sup>324</sup> *Id.* at \*7.

<sup>325</sup> *Id.* at \*5-6.

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