CASE NOTES

recent environmental cases and final rules

Environmental and Natural Resources Section OREGON STATE BAR
Editor: Micah Steinhilb October 2010

Editor's Note: This issue contains selected summaries of cases and administrative final rules issued in June, July, and August 2010. Please contact me if you have any comments or suggestions about the newsletter, or would like to recommend a case or rule for inclusion in future issues. Thank you to all of the volunteer authors in this issue and to those who have signed up to write summaries for future newsletters. If you are interested in summarizing cases and rules for this newsletter, please contact me.

Micah Steinhilb
Case Notes Editor
steinhmr@yahoo.com
(541)380-0293

or

Bodyfelt Mount
steinhilb@bodyfeltmount.com
(503)243-1022

CONTENTS

Monsanto Co. v. Geertson Seed Farms, __ U.S. __, 130 S.Ct. 2743, 177 L.Ed.2d 461 (2010).

Dan Hytrek, NOAA General Counsel's Office, Southwest Region
dan.hytrek@noaa.gov

The Animal Plant Health Inspection Service (APHIS) unconditionally deregulated genetically-altered, Roundup-tolerant alfalfa (Roundup Ready Alfalfa or RRA) under the Plant Protection Act. In doing so, APHIS prepared an Environmental Assessment and issued a Finding of No Significant Impact. Conventional alfalfa growers and environmental groups challenged that decision on the grounds that it violated the National Environmental Policy Act and other federal laws. The District Court held that APHIS violated NEPA by deregulating RRA without preparing an Environmental Impact Statement (EIS). In the remedial phase, the District Court entered a permanent injunction that vacated APHIS's deregulation decision; ordered APHIS to prepare an EIS before it made any decision on Monsanto's deregulation decision; enjoined the planting of any RRA nationwide pending APHIS's completion of the EIS, but after a certain date to allow farmers who had already purchased RRA to plant their seed; and imposed certain conditions on the handling of already-planted RRA. The Government, Monsanto (owner of intellectual property rights to RRA), and the licensee of intellectual property rights to RRA appealed, challenging the scope of relief granted but not disputing that there was a NEPA violation. The Ninth Circuit affirmed. In an opinion by Justice Alito, the Supreme Court reversed and remanded. Justice Stevens filed a lone dissent.

The Supreme Court first decided standing issues. The Court held that petitioners, Monsanto and the licensee, had constitutional standing to seek review; and respondents, conventional alfalfa farmers and environmental groups, had constitutional standing to seek injunctive relief from APHIS's action.

On the merits, the Court reiterated the traditional four part test that a plaintiff must satisfy before a court may grant a permanent injunction. Citing *Winter v. Natural Resources Defense Council, Inc*., 555 U.S. __, ___, 129 S. Ct 365, 380-82, 172 L.Ed.2d 249 (2008), the Court noted that this test applies without any presumption that an injunction is generally appropriate when a plaintiff seeks a permanent injunction to remedy a NEPA violation. The Court held that the District Court abused its discretion by enjoining APHIS from any partial deregulation of RRA during the preparation of an EIS. The Court stated that none of the four part test factors support the District Court's injunction prohibiting partial deregulation. Most importantly, respondents cannot show that they will suffer irreparable injury if APHIS is allowed to proceed with any partial deregulation.

In addition, the Court held that the District Court erred in entering a nationwide injunction against planting RRA for two reasons. First, because it was inappropriate for the District Court to foreclose even the possibility of a partial and temporary deregulation, it necessarily follows that it was inappropriate to enjoin any and all parties from acting in accordance with such a potential deregulation decision. Second, an injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course. No recourse to such an extraordinary remedy was necessary if a less drastic remedy, such as partial or complete vacatur of APHIS's deregulation decision, was sufficient to redress respondents' injury.

League of Wilderness Defenders v. U.S. Forest Service, 615 F.3d 1122 (9th Cir 2010).
Erin Madden, Cascadia Law, P.C.
erin.madden@gmail.com

League of Wilderness Defenders v. U.S. Forest Service (LOWD) is the latest decision from the Ninth Circuit regarding the implementation of the Northwest Forest Plan (NFP). In this case, conservation groups sued the Forest Service arguing that the Five Buttes timber sale violated the National Forest Management Act (NFMA) and the National Environmental Policy Act (NEPA). Plaintiffs argued that the sale violated the NFP, and therefore NFMA, because it included logging suitable spotted owl habitat within a protected Late Successional Reserve (LSR). Under NEPA, Plaintiffs argued that the Forest Service failed to adequately analyze cumulative impacts or respond to opposing opinions regarding the impact of logging large trees on fire risk.

In 2003, the Davis fire burned 21,000 acres in the Deschutes National Forest. In response the Forest Service developed the Five Buttes sale to reduce fire risk in the project area. The sale included logging 618 acres of suitable spotted owl habitat within the Davis LSR. The NFP generally prohibits logging in LSRs. However, east of the Cascades (where the sale was located), the NFP allows logging in LSRs if three requirements are met: "(1) the proposed management activities will clearly result in greater assurance of long-term maintenance of habitat, (2) the activities are clearly needed to reduce risks, and (3) the activities will not prevent the [LSRs] from playing an effective role in the objectives for which they were established."

Without specifically addressing the three requirements above, the majority deferred to the Forest Service's determination that the loss of suitable habitat for 20-50 years after logging was outweighed by the reduction in fire risk associated with logging. The court praised this balancing approach as "entirely appropriate under the NFP." The court also noted that the agency undertook modeling which showed that cutting only smaller trees would not change the expected fire behavior, and therefore some logging of larger trees was necessary.

With regards to Plaintiffs' NEPA claims, the majority held that the Forest Service's analysis included a sufficient discussion of the aggregate impacts of past, present, and future actions. The court noted that the EIS discussed "previous declines, trends and threats to spotted owl population and habitat" and described possible overlapping effects of other projects and natural disturbances. Thus, the agency's cumulative impacts analysis satisfied NEPA. Further, the court held that rather than ignoring opposing viewpoints regarding the impacts of logging large trees on fire behavior and risk, the agency actually embraced scientists' recommendations by limiting the number of larger trees that would be logged and conducting additional modeling regarding the likely impacts of logging on fire risk.

The dissent agreed with the majority as to the NEPA claims, but disagreed strongly on the NFMA claim. The dissent highlighted the very limited exceptions to logging within LSRs and discussed in detail why the agency failed to meet the requirements of the NFP. First, the dissent found that the Forest Service never explained the basis for its assumption of current fire risk in the area, nor weighed the benefit of risk reduction against the cost of a 20-50 year loss of spotted owl habitat. Thus, the agency failed to establish that the proposed management would "clearly

result in greater assurance of long-term maintenance of habitat." Next, the dissent found that the agency failed to establish that logging was "clearly needed" to reduce fire risk, concluding that the Forest Service's reasoning was unsupported and conclusory. Finally, the dissent concluded that degrading suitable owl habitat necessarily prevents the LSR from playing an effective role in the spotted owl's survival and recovery.

Northern Cal. River Watch v. Wilcox, 620 F.3d 1075 (9th Cir. 2010).
Nathan Baker, Friends of the Columbia Gorge
nathan@gorgefriends.org

In this case, the Ninth Circuit evaluated whether the removal of endangered plants from federally regulated wetlands on private property was a taking under the ESA.

Section 9(a)(2)(B) in pertinent part makes it unlawful to "remove and reduce to possession any [endangered plant] species from areas under Federal jurisdiction [or] maliciously damage or destroy any such species on any such area." 16 U.S.C. § 1538(a)(2)(B). The plaintiffs argued that private lands subject to regulation by the federal government—such as wetlands subject to the permitting requirements of the Clean Water Act—are covered by the phrase "areas under Federal jurisdiction." The United States, participating as *amicus curiae*, disagreed, and argued that the phrase should be read more narrowly to include only lands where the federal government holds a property interest.

First, the court held that the disputed phrase was ambiguous. However, the court found no legislative history to shed light on the issue, nor any prior interpretation by the Fish and Wildlife Service (FWS) for which the agency could receive deference.

Given the absence of congressional and agency guidance, the court construed the phrase "areas under Federal jurisdiction" on its own, ultimately deciding that the phrase does *not* include private land subject to federal Clean Water Act authority. According to the court, the "potential for overbreadth posed by [the plaintiffs' interpretation] is simply too large."

The court gave the FWS the opportunity for the last word, inviting it to adopt regulations or guidance defining "areas under Federal jurisdiction" in the future.

Modesto Irrigation Dist v. Guitierrez, 619 F.3d 1024 (9th Cir. 2010).
Dallas DeLuca, Markowitz, Herbold, Glade & Mehlhaf, P.C.
DallasDeLuca@MHGM.com

Defendant National Marine Fisheries Service listed steelhead that spawn in California's Central Valley rivers as a threatened species under the Endangered Species Act. In doing so, NMFS defined steelhead as a distinct species from rainbow trout, "another type of Pacific salmon that breeds with and looks like the steelhead." Plaintiffs claimed that defendants violated the ESA because the two fish interbreed and violated the Administrative Procedures Act by not

adequately explaining the change in NMFS policy, where NMFS had previously classified those fish as a single species.

The Ninth Circuit Court of Appeals held that the ESA allowed NMFS to classify the two fish, although interbreeding, as different species because they were in distinct population segments. The court also held that NMFS had adequately justified its change in policy. The court affirmed the district court's decision granting summary judgment to defendants and denying plaintiffs' motion for summary judgment.

Background

The rainbow trout and the steelhead are scientifically classified as the same species, the *Oncorhynchus mykiss*, lovingly referred to by the court as "*O. mykiss*." The fish interbreed, but the offspring have different behaviors, with a major difference being that steelhead are anadromous, spending up to three years in the ocean, while rainbow trout are resident, living their entire lives in fresh water. Because of that difference, NMFS and the Fish and Wildlife Service have overlapping jurisdiction for *O. mykiss* under the ESA. Another critical difference is that while a robust anadromous *O. mykiss* population can revive a declining resident population, the opposite likely is not true. The parties did not dispute that the steelhead are in decline in the California Central Valley.

The ESA provides that "species" includes "any subspecies" and "any distinct population segment ["DPS"] of any species of vertebrate fish or wildlife which interbreeds when mature." DPS is not a scientific term and Congress did not define it. In interpreting the DPS term, in 1991 NMFS created a policy called the Evolutionary Significant Unit to apply solely to Pacific salmon species. In 1996, NMFS and FWS agreed on a DPS policy to apply to all other animal species. The key difference between the policies is that under the ESU policy, "a type of Pacific salmon had to be 'substantially reproductively isolated' from other salmon stock before it could be classified in its own ESU, whereas, under the DPS Policy, an organism could be placed its own DPS so long as it was 'markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors.'"

Under the ESU policy, NMFS classified rainbow trout and steelhead that occupied the same rivers in the same ESUs. In 1997, NMFS was concerned about declining steelhead populations in several ESUs but FWS objected to listing rainbow trout in those ESUs under the ESA. Because of that objection, NMFS defined steelhead and rainbow trout as different subgroups under the ESUs and listed only the steelhead populations as endangered or threatened. In *Alsea Valley Alliance v. Evans*, 161 F.Supp.2d 1154, 1161-64 (D.Or. 2001), the court concluded that the ESA requires agencies list entire ESUs under the ESA. "Listing distinctions below that of subspecies or a DPS of a subspecies," the court stated, "are not allowed under the ESA." *Id.* at 1162. In response to that decision, as well as in response to public and FWS comments and to new scientific information, NMFS abandoned the ESU policy for *O. mykiss* and instead applied the DPS policy. In 2005, NMFS determined that steelhead and rainbow trout in the Central Valley were different DPSs, and then NMFS listed the Central Valley steelhead DPS as threatened under the ESA.

The court allows NMFS's interpretation of the term "distinct population segment."

In analyzing an agency's interpretation of a statutory term, a court must first determine if the term is unambiguous or ambiguous. If ambiguous, the court then determines merely whether the agency's interpretation is a permissible interpretation. The court applied that Chevron deference standard to 16 U.S.C. § 1532(16), which provides that "[t]he term 'species' includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." The court rejected plaintiffs' argument that the term was unambiguous and required NMFS to classify all organisms that interbreed in the same DPS. The court concluded that the statute was "grammatically ambiguous" and agreed with NMFS that the statute "does not necessarily indicate that interbreeding must be the sole defining characteristic of a DPS[.]" The court held that the NMFS decision was a permissible interpretation of the ESA.

The court concludes that NMFS's justification for the policy change was adequate under the 2009 Supreme Court decision in *F.C.C. v. Fox Television Stations, Inc.*

When an agency changes a policy, it is required to explain that change. *See F.C.C. v. Fox Television Stations, Inc.*, __ U.S. __, 129 S.Ct. 1800, 1810-11, 173 L.Ed.2d 738 (2009) (overturning circuit court precedent that applied a heightened standard of review under the APA to policy changes). The Ninth Circuit applied the new, more lenient, standard of review from *Fox* to NMFS's change in policy and upheld the change. Under *Fox*, an agency need only (1) acknowledge that there is a change in policy and explain the change, (2) demonstrate that the new policy is permissible under the statute, (3) show that there are "good reasons for the new policy[,]" and (4) indicate that it believes that the new policy is better than the old policy. *Fox*, 129 S.Ct. at 1811. The agency does not need to prove to the satisfaction of the reviewing court that the new policy actually is better than the old policy. *Id.*

The court in *Modesto Irrigation District* quickly determined that NMFS satisfied the first, second, and fourth requirements under *Fox*, because it had already concluded that agency's interpretation of the ESA term DPS was permissible. To determine whether the agency had provided "good reasons for the new policy[,]" the court stated that under *Fox* "[w]e must 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.'" The court then reviewed, and found adequate, the record in which NMFS had explained that its decision to change policy was based on new scientific information about *O. mykiss*. The court rejected plaintiffs' argument that the record also contained evidence that did not support the NMFS change. The court stated, "[w]e must defer to a reasonable agency action 'even if the administrative record contains evidence for and against its decision.'" (Citation omitted). Given the new level of judicial deference to changes in agency decisions under *Fox*, agencies, armed with new scientific information or even with just a "better reading" of the relevant statute, *see Ad Hoc Shrimp Trade Action Comm. v. United States*, 596 F.3d 1365, 1372 (Fed.Cir. 2010) (upholding policy change where agency determined that a "better reading" of the controlling statute required a departure from previous practice), should have an easier time surviving judicial review of rule changes.

Colton v. American Promotional Events, 614 F.3d 998 (9th Cir. 2010).

Jared Ogdon, Oregon Court of Appeals, Judicial Clerk for Hon. Rex E. Armstrong
jared.a.ogdon@ojd.state.or.us

Plaintiff City of Colton brought an action against numerous industrial entities to recover response costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) allegedly resulting from perchlorate contamination in the groundwater basin that supplies the city's water. Colton filed the suit after discovering that three of its municipal wells were contaminated with perchlorate and implementing a program to remove the contamination.

Defendants filed a motion for summary judgment asserting that Colton was not entitled under CERCLA to recover the costs of its remediation program. The district court granted defendants' motion, concluding that (1) Colton could not recover those costs because it failed to show, as required by CERCLA section 107(a), that they were "necessary and consistent" with the national contingency plan (NCP); and (2) Colton's claim for declaratory relief for future cleanup costs necessarily failed because it was not entitled to recover for its past cleanup costs. Colton appealed that decision to the Ninth Circuit.

On appeal, Colton conceded that its past response to the groundwater contamination failed to comply with the NCP, and the court found that was sufficient to affirm the summary judgment with regard to Colton's past response costs. However, Colton argued that it was error for the district court to grant summary judgment on the city's claim for declaratory relief as to its future response costs. After disposing of several jurisdictional arguments, the Ninth Circuit addressed the merits of that assertion and noted that the circuits are split on the question of "[w]hether a CERCLA plaintiff's failure to establish liability for its past costs necessarily dooms its bid to obtain a declaratory judgment as to liability for its future costs * * *." *Id.* at 1006-07.

The court observed that CERCLA section 113(g)(2) specifically provides that, as part of any initial cost-recovery action under section 107, "the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any *subsequent* action or actions to recover *further* response costs or damages." 42 U.S.C. § 9613(g)(2) (emphasis added). In light of this statutory text, the Ninth Circuit concluded that "declaratory relief is available only if liability for past costs has been established under section 107." *Id.* at 1008. Furthermore, the court concluded that, contrary to Colton's assertions, "CERCLA's purposes would be better served by encouraging a plaintiff to come to court only after demonstrating its commitment to comply with the NCP and undertake a CERCLA-quality cleanup." *Id*. Accordingly, the Ninth Circuit affirmed the grant of summary judgment and also concluded that the district did not abuse its discretion by declining to exercise supplemental jurisdiction over Colton's related state law claims.

Cal. Dept of Toxic Substances v. Hearthside Residential Corp., 613 F.3d 910 (9th Cir 2010)
Diana Fedoroff, Bodyfelt Mount
fedoroff@bodyfeltmount.com

Hearthside Residential owned a tract of wetlands contaminated with PCBs, called "the Fieldstone Property," in Huntington Beach, California. In 2002, Hearthside entered into a consent order with the California Department of Toxic Substances to remediate the PCB contamination on its land. The Department also contended Hearthside was responsible for

remediating PCB contamination that had migrated to adjacent residential properties from the Fieldstone Property. When Hearthside disclaimed responsibility for the adjacent properties, the Department itself undertook clean up activities on those properties in 2002 and 2003. In 2005, the Department certified the Fieldstone Property clean up was complete. Shortly thereafter, Hearthside sold the property to the California State Lands Commission.

This case began in 2006, when the Department filed suit against Hearthside, seeking reimbursement for costs it incurred in cleaning up the residential properties adjacent to the Fieldstone Property. The Department alleged the Fieldstone Property was the source of the contamination on the residential properties, and that Hearthside was liable as an "owner" under CERCLA section 107(a) because it owned the source of the contamination at the time the clean up activities occurred on the residential properties. Hearthside argued that it was not liable because it had sold the property before the Department filed its recovery suit. The district court ruled in favor of the Department on summary judgment, but also certified the question for immediate appeal to the Ninth Circuit.

The question before the Court of Appeals was: when is "owner" status under CERCLA determined—at the time the recovery claim accrues (i.e., when the clean up costs are incurred), or at the time a recovery suit is filed? The court upheld that district court's decision and held that "the owner of the property at the time cleanup costs are incurred is the current owner for purposes of determining CERCLA liability."

Finding the CERCLA definition of "owner and operator" to be silent on this question, the court looked to the context and purposes of CERCLA. The court found that Congress' decision to trigger the statute of limitations at the time of cleanup, rather than at the initiation of a recovery suit, was strong contextual evidence that Congress intended for the owner at the time of cleanup to bear the "owner" liability in a subsequent recovery suit. The court also found that two importation purposes of CERCLA—to encourage speedy remediation and early settlement between potentially responsible parties—supported the conclusion that ownership is measured at the time of cleanup. The court noted that the alternative conclusion (that ownership is determined as of the initiation of a recovery suit) would provide incentives for a potentially responsible party to delay clean up activities and would always require a lawsuit to resolve liability, which would contravene the purposes of CERCLA.

Arizona Cattle Growers Assn v. Salazar, 606 F.3d 1160 (9th Cir. 2010).
Nathan Karman, Ater Wynne
nak@aterwynne.com

The Arizona Cattle Growers Association ("Arizona Cattle") challenged two issues related to the Fish and Wildlife Service's ("FWS") 2004 designation of almost 9 million acres of critical habitat for the Mexican Spotted Owl, a threatened species under the Endangered Species Act ("ESA"). Arizona Cattle challenged the designation on multiple grounds, two of which were appealed to the Ninth Circuit: (1) that FWS impermissibly treated areas in which no owls are found as "occupied" and (2) that in evaluating the economic impacts of the designation, FWS applied an impermissible "baseline" approach that excluded economic impacts of protecting the owl that

would occur regardless of the critical habitat designation. The Ninth Circuit rejected both arguments and upheld FWS's determination.

With respect to the "occupied" challenge, Arizona Cattle argued that "occupied" is unambiguous and must be interpreted to mean areas that the species "resides in." FWS, on the other hand, argued that where a geographic area is used with such frequency that the owl is likely to be present, it may permissibly designate the area as occupied. According to FWS, this would include the owl's "home range" and may include other areas used for intermittent activities. The Ninth Circuit noted that the occupied inquiry involves two components: uncertainty, which is a factor when FWS believes that listed species are present but lacks conclusive evidence, and frequency, which is a factor when owls have an intermittent presence in the area. The parties differed over their interpretation and application of the frequency factor. The Ninth Circuit agreed with FWS's interpretation, holding that FWS has the authority to designate as occupied "areas that the owl uses with sufficient regularity that it is likely to be present during any reasonable span of time." The court also found that FWS acted consistently with that authority in designating the owl's critical habitat. The court, however, was careful to note that FWS is not without limitation in determining that an area is occupied. In particular, it cannot determine that unused areas (which do not include areas regularly used by migratory or mobile species) "are occupied merely because those areas are suitable for future occupancy."

With respect to the economic impacts argument, the Ninth Circuit began by clarifying when the economic analysis arises. In particular, the decision to list a species, which results in certain protections for a species, is made without reference to economic impacts. Before designating critical habitat, however, FWS must conduct an economic impact of the designation. FWS can then exclude an area from designation if it determines that "the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat," unless exclusion would cause the species to become extinct. The parties disagreed over whether FWS was required to attribute to the designation economic burdens that would exist in the absence of that designation--namely, those burdens resulting from the listing alone. FWS, applying a "baseline" approach to the economic impacts analysis, excluded economic impacts of protecting the owl that would occur regardless of the critical habitat analysis. Arizona Cattle, relying on a Tenth Circuit opinion, argued that this approach was error, and that FWS was required to apply a "co-extensive" approach which would ignore protections resulting from the listing decision. The Ninth Circuit found that the Tenth Circuit opinion relied on regulations that the Ninth Circuit had since invalidated, and held that the FWS may employ the baseline approach in analyzing the critical habitat designation.

Butte Environmental Council v. U.S. Army Corps of Engineers, 607 F.3d 570 (9th Cir. 2010)
(Editor's Note: this opinion has been amended and superseded by 620 F.3d 936 (9th Cir. 2010))
Michael J. Gelardi, Davis Wright Tremaine LLP
MichaelGelardi@dwt.com

In a decision implicating both the Clean Water Act ("CWA") and the Endangered Species Act ("ESA"), the Ninth Circuit Court of Appeals upheld a biological opinion and wetland fill permit for construction of a business park in Redding, California. After years of researching potential

sites for economic development, the City of Redding decided to construct a business park on a nearly 700-acre site located on wetlands along Stillwater Creek. The wetlands include shallow depressions that seasonally fill with water known as vernal pools. These pools contain critical habitat for several ESA-listed species including the vernal pool fairy shrimp, the vernal pool tadpole shrimp and the slender Orcutt grass.

The City prepared an Environmental Impact Statement ("EIS") concluding that the site was the least environmentally damaging of the potential project sites that satisfied both the purpose and feasibility criteria for the project. The EIS formed the basis of a "no jeopardy" biological opinion ("BiOp") by the U.S. Fish and Wildlife Service ("FWS") under the ESA and a wetland fill permit from the Army Corps of Engineers (the "Corps") under Section 404 of the CWA. Plaintiff Butte Environmental Council challenged both the BiOp and the 404 permit as arbitrary and capricious under the federal Administrative Procedures Act.

With regard to the Corps' 404 permit, Plaintiff challenged various aspects of the City's alternatives analysis as well as its plans to minimize and mitigate environmental impacts on the site. Many of these challenges turned on the Corps' acceptance of the City's contention that the business park had to contain a contiguous 100-acre parcel in order to fulfill the city's economic purpose. Although the Corps had criticized the proposed 100-acre parcel in its comments on the draft EIS, the Corps later accepted the City's argument that the large parcel was necessary to create "synergy" between the various tenants at the business park. The court held that the Corps' decision survived arbitrariness review because even though the Corps changed its mind, its path of reasoning was clear from the record of back-and-forth exchanges with the City.

As for the BiOp, the court dismissed Plaintiff's arguments without much substantive discussion. In *Gifford Pinchot Task Force v. FWS*, 378 F.3d 1059 (9th Cir. 2004), the Ninth Circuit held that the regulatory definition of "adverse modification" of habitat promulgated by the FWS did not adequately reflect the ESA's mandate to allow a species to recover to the point where it may be delisted. Here, despite Plaintiff's argument that the FWS did not account for the vernal pool species' recovery needs, the court took FWS at its word that the Redding BiOp was based on the Gifford Pinchot standard and not the rejected FWS regulatory definition. The court also held that it was proper for FWS not to consider either the local impacts of habitat modification or the rate of vernal pool habitat loss.

Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Dept. of Interior, 608 F.3d 592 (9th Cir. 2010).
Joe Pitt, Associate Attorney General, Confederated Tribes of the Umatilla Indian Reservation
joepitt@ctuir.org

Plaintiffs Te-Moak Tribe of Western Shoshone of Nevada, the Western Shoshone Defense Project, and Great Basin Mine Watch appealed a decision of the United States District Court for the District of Nevada granting summary judgment to the Department of Interior, Bureau of Land Management (BLM) and Cortez Gold Mines, Inc. (Cortez) on plaintiffs' National Environmental Policy Act (NEPA), National Historic Preservation Act (NHPA) and Federal Land Policy and Management Act (FLPMA) claims. Plaintiffs' claims were associated with the BLM's issuance of a Finding of No Significant Impact (FONSI) approving Cortez's proposed

amendment to the plan of operations (Amendment) for an existing mineral exploration project (Project) in northeastern Nevada. The Ninth Circuit affirmed with respect to the NHPA and FLPMA claims, but reversed and remanded for further proceedings concerning plaintiffs' claim that BLM violated NEPA by insufficiently analyzing the cumulative impacts of Cortez's expanded exploration project.

NEPA

The original plan of operations for the Project allowed Cortez to disturb a total of 50 acres within the project area, while the Amendment would allow the disturbance of 250 acres in three phases of exploration. Plaintiffs argued that BLM violated NEPA by approving the Amendment without knowing the precise locations of future drill sites, access roads, or other exploration activities associated with the later phases. The court held that BLM did not violate NEPA in approving the Amendment without this information, due to the inherent uncertainty associated with mineral exploration and the fact that BLM had analyzed the impact of drilling activities in all parts of the project area and had imposed avoidance and mitigation measures to account for unknown impacts. Plaintiffs also argued that BLM failed to consider all reasonable alternatives to the Amendment. The court held that BLM properly excluded certain alternatives that were substantially similar to alternatives that BLM analyzed.

Plaintiffs' final NEPA argument alleged that BLM's analysis of the cumulative impacts of the Amendment was inadequate. The court agreed with the plaintiffs that BLM's analysis of the cumulative impacts of the Amendment was inadequate, as the agency focused on the direct impacts of the Amendment itself, not the combined impact of the amendment in combination with other reasonably foreseeable projects, and it stated conclusions without supporting analysis. Cortez argued that the plaintiffs bore the burden of showing that cumulative impacts would actually occur. The court disagreed, holding that such a rule would improperly require the public, rather than the agency, to ascertain the cumulative impacts of a proposed action; instead, the plaintiffs needed only to show the potential for cumulative impact. Plaintiffs met this burden by showing that both the Amendment and another existing project would have direct effects on the same resources within the cumulative impacts area, demonstrating the potential for cumulative effects.

NHPA

Plaintiffs also argued that the BLM's approval of the Amendment violated section 106 of the NHPA, in that the BLM (1) failed to consult with the Tribe regarding potential adverse effects on National Register eligible sites in a timely manner as required by NHPA and (2) the BLM's decision regarding adverse effects to National Register eligible sites was incorrect and unsupported by the record. The court held that since BLM had consulted the Tribe when considering the original exploration project and other projects in the area, the Tribe had been provided a sufficient opportunity to identify its concerns about historic properties and had not identified any additional information it would have contributed if consulted earlier in the process. The Tribes' second NHPA claim argued that the National Register eligible sites were "landscape level" and that the BLM's use of exclusion zones to avoid adverse impacts to the sites was therefore inadequate. The court disagreed, holding that the NHPA only requires an agency to protect against adverse effects to those aspects of a site that make it eligible for the National

Register and the plaintiffs failed to demonstrate that the exclusion zones would not effectively prevent adverse impacts to these features.

FLPMA

Finally, the plaintiffs argued that BLM's approval of the Amendment violated FLPMA, by failing to require Cortez to submit information set forth in 43 C.F.R. § 3809.401 and failing to require Cortez's operations plan to satisfy the performance standards set forth in 43 C.F.R. § 3809.420. With regard to 43 C.F.R. § 3809.401, the court disagreed with the plaintiffs' claims because the relevant information was either applicable only to mining projects or because it was not required in phased exploration projects. With regard to 43 C.F.R. § 3809.420, the court held that since BLM approved the Amendment subject to conditions as allowed by 43 C.F.R. § 3809.411(d)(2), BLM did not violate FLPMA.

The matter was remanded to the district court with instructions to grant summary judgment to plaintiffs on their NEPA claim and to remand the matter to BLM for further cumulative impacts analysis.

Alliance for the Wild Rockies v. Cottrell, 613 F.3d 960 (2010)
(Editor's note: this opinion has been amended by __ F.3d __ (9th Cir. Sept. 22, 2010) 2010 WL 3665149)
Chip Horner, Hoffman, Hart & Wagner
crh@hhw.com

Alliance for the Wild Rockies (AWR) appealed the Montana District Court's denial of a preliminary injunction halting a proposed Forest Service timber sale proceeding under an Emergency Situation Determination (ESD). On appeal, the Ninth Circuit considered the continued viability of the "sliding scale" and "serious questions" factors in the evaluation of preliminary injunction requests following the U.S. Supreme Court's ruling in *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365 (2008). In *Winter*, the Supreme Court disagreed with another factor of the Ninth Circuit's test for preliminary injunctions, explaining that plaintiff must establish that irreparable harm is likely, rather than possible, in order to obtain a preliminary injunction.

Thus, the Ninth Circuit now considered whether or not the established sliding scale approach, under which "elements of the preliminary injunction tests are balanced, so that a stronger showing in one element may offset a weaker showing of another," remained valid post *Winter*.

Ultimately, the court concluded *Winter* neither explicitly nor implicitly rejected the Ninth Circuit's sliding scale approach; particularly considering the important flexibility provided by this method.

Given this conclusion, the court then analyzed and overturned the District Court's refusal to grant an injunction. The court found irreparable harm was likely to result in the absence of an injunction, based on the logging of approximately 1,652 acres of forest; satisfying the likelihood

of irreparable injury requirement under *Winter*. The court further questioned the sufficiency of the Forest Service's justifications in issuing an ESD.

ONDA v. Tidwell, __ F.Supp.2d __ (D.Or. June 4, 2010), 2010 WL 2246419
Marianne Dugan, Attorney at Law
mdugan@mdugan.com

This decision addressed several issues related to livestock grazing on the Malheur National Forest on 13 grazing allotments. The lawsuit was brought pursuant to the Endangered Species Act (ESA) and National Forest Management Act (NFMA).

Under the ESA, the court ruled that Forest Service (1) violated ESA section 7(a)(2) by relying on a biological opinion which the Forest Service knew contained inaccurate information; (2) violated ESA section 9 by authorizing grazing which resulted in unlawful "take" of steelhead due to adverse effects to critical habitat; and (3) violated obligations under ESA regulations and ESA section 7(d) in failing to properly reinitiate formal consultation with Fish and Wildlife Service on all 13 allotments and failing to issue letters under section 7(d) for several allotments.

The court also ruled that the Forest Service had violated NFMA in three annual grazing authorizations, by not gathering or evaluating sufficient data regarding steelhead habitat to allow the agency to assess whether it was in compliance with the Malheur Forest Plan's habitat viability standard and the "Interim Strategies for Managing Anadromous Fish Producing Watersheds in Eastern Oregon and Washington, Idaho, and Portions of California," commonly known as "PACFISH."

The court held, however, that it cannot specifically direct the Forest Service to measure riparian management objectives to assess PACFISH compliance, citing *Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008).

Northwest Pipe Co. v. RLI Ins. Co., __ F.Supp.2d __ (Aug. 12, 2010) 2010 WL 3220298
Robin Bellanca Seifried, Cable Huston Benedict Haagensen & Lloyd LLP
rseifried@cablehuston.com

Northwest Pipe Co. v. RLI Ins. Co. examined when the exhaustion of underlying policies will trigger an insurer's duty to defend under an umbrella policy. The issue before the court was whether the insurer's duty to defend is triggered by the exhaustion of the underlying coverage for the same effective period as the insurer's policy or by the exhaustion of all underlying coverage. Under the policy, there was a duty to defend "with respect to any occurrence not covered by…other underlying insurance collectible by [Plaintiff]." The policy did not defined "other underlying insurance," so the court examined the term within the context of the policy as a whole. The policy defined "other insurance" as "other valid and collectible insurance with any other carriers…available to [Plaintiff] covering a loss also covered by" the subject policy. The policy described losses covered as "property damage…caused by or arising out of each occurrence." The policy defined "occurrence" as "an accident or a happening or event or a

continuous or repeated exposure to conditions which unexpectedly and unintentionally results in…property damage…during the policy period."

From the limitation on occurrence to the policy period, the court determined that losses covered by the policy included only those occurring during the policy period. Because "other insurance" is defined as insurance covering a loss also covered by the subject policy, "other underlying insurance" must also be limited to policies covering losses that occurred during the same policy period. The court concluded that the insurer's duty to defend was triggered by the exhaustion of underlying coverage for the same effective period as the insurer's policy.

Umpqua Watersheds v. United States Forest Service, __ F.Supp.2d __ (D.Or. July 10, 2010) 2010 WL 2926172

David F. Doughman, Beery Elsner & Hammond, LLP
David@gov-law.com

In *Umpqua Watersheds, et. al. v. United States Forest Service* ("USFS"), environmental groups challenged a USFS decision affecting the Oregon Dunes National Recreation Area ("ODNRA"). The ODNRA is the largest expanse of sand dunes along the Pacific Coast in all of North America. Slip op. at 1. In 1994, USFS published a management plan for ODNRA. It prepared an Environmental Impact Statement ("EIS") under the National Environmental Policy Act ("NEPA") and established 12 management areas ("MAs") within the ODNRA.

In 2009, USFS implemented the Riley Ranch Access project (the "Project"), which authorized a mile long, 14 foot wide trail in MA 10(c). Under the 1994 plan, MA 10(c) restricts the use of off-highway vehicles ("OHVs") to designated routes. The 2009 Project permitted OHVs, horses, and hikers to use the trail.

Coos County right-of-way runs through the property where the trail is to be located. The county also owns property east of and abutting that property. The county has a campground on its property that is popular with OHV users. The county additionally owns an 80-acre parcel west of the subject property. USFS land, most of which is open to OHVs, surrounds the county's 80 acres. The easiest way for visitors to the county campground to reach the 80-acre parcel is through MA 10(c).

Plaintiffs argued that USFS's decision violated NEPA and the National Forest Management Act ("NFMA"). Plaintiffs alleged that the Project was inconsistent with the 1994 ODNRA plan because it authorized a significant amendment without following proper procedures. Both parties moved for summary judgment. The court denied Plaintiffs' motion for summary judgment and USFS's motion.

Under the Administrative Procedure Act, an agency decision may be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Slip op. at 4. The APA requires an agency to articulate a "rational connection between the facts found and the conclusions made." *Id.* Because NEPA is a procedural statute and does not contain substantive criteria, agencies are required to take a "hard look" at a proposed action's environmental

consequences. If a proposed action will significantly affect the human environment, the agency must prepare an EIS. If a proposed action will not significantly affect the environment, the agency may still need to prepare a less demanding Environmental Assessment ("EA"). Slip op. at 3. USFS prepared an EA in this case after it determined that the Riley Ranch project would not have a significant environmental impact. *Id*. After considering an alternative that it believed would lead to increased OHV riding on user-created trails in MA 10(c), the USFS approved the Project and issued a Finding of No Significant Impact ("FONSI"), concluding that the Project would prohibit any additional OHV trails in MA 10(c). *Id*.

Plaintiffs argued that the USFS violated NEPA by not considering the Project's cumulative impacts. Specifically, Plaintiffs believed that the Project was likely to encourage expansion of the county's OHV facilities. Slip op. at 5. The court rejected that argument. While an EA must contain a discussion of a decision's environmental effects, the court found that the relevant administrative rules do not specifically require an EA to contain a cumulative impact analysis. *Id*. The court determined that the Project would limit environmental impacts by formally closing all OHV trails in MA 10(c) except for the designated trail. *Id*. The court did not believe that the EA needed to address the possible expansion of the county's facilities or assess the Project's affect on the entire ODNRA.

Plaintiffs also asserted that USFS improperly issued a FONSI because the Decision relied on insufficient mitigation measures that would not completely compensate for any adverse environmental impacts. Slip op. at 7. Here again, the Plaintiffs' arguments did not persuade the court. It concluded that based on the evidence in the record USFS could find that the Project would improve conditions in MA 10(c). *Id*. By designating a single OHV trail, the Decision would prohibit the creation of additional OHV trails and as a result, OHV use would likely damage fewer resources over time. *Id*. The court believed the Project's physical barriers and establishment of signs to prohibit trespasses from the trail were sufficient mitigation measures. *Id*.

Finally, Plaintiffs asserted that USFS violated the NFMA by failing to follow guidelines established in the National Forest Service Manual and Handbook when it approved the Project and designated the area as "open to motorized use." Slip op. at 10. Based on Ninth Circuit precedent, the court found that the manual and handbook "do not have independent force and effect of law." *Id*. Consequently, the court rejected this aspect of the Plaintiffs' NFMA claim. Plaintiffs additionally argued that the Project was a "significant" amendment to the 1994 plan because it officially opened a trail to OHV use. After reviewing the record, the court similarly rejected this argument. It noted that the USFS's failure since 1994 to designate a trail officially in MA 10(c) for OHV and equestrian use resulted in several user-created trails. By limiting such uses in the area to one designated trail, the court deferred to the agency's determination that the Project did not constitute a significant amendment to the 1994 plan.

Friends of the Columbia Gorge v. Columbia River Gorge Comm'n, 236 Or.App. 479 (2010).
Christine (Zemina) Hein, Bateman Seidel
chein@batemanseidel.com

In this case, the Oregon Court of Appeals rejected three assignments of error to a final order of the Columbia River Gorge Commission (the "Commission") amending the land use management Plan (the "Plan") of the Columbia Gorge National Scenic Area (the "Scenic Area") to make it possible to convert a closed Broughton Lumber Company 50-acre mill site into a recreation resort. The Commission adopted the amendment in its legislative capacity, following notice and a public hearing, specifically to accommodate the proposed development. Friends of the Columbia Gorge and other conservation organizations, nearby businesses, and private individuals challenged the Commission's final order on three grounds: (1) that the Commission lacked authority to amend the Plan outside its usual revision schedule because conditions in the Scenic Area had not significantly changed; (2) that the amendment violates the second express purpose of the Columbia River Gorge National Scenic Area Act, 16 U.S.C. §§ 544–544p (the "Act"), which is to encourage economic development in existing urban areas within the gorge; and (3) that the Commission inappropriately made an "existing industrial use" designation.

With regard to the first assignment of error, the court upheld the Commission's finding that significant changes had occurred justifying an amendment of the Plan under OAR 350-050-0030(1). Specifically, the court rejected challenges to the Commission's determination that changes in the degree and duration of the decline in the timber industry themselves constituted significant changes. When reviewing the Commission's interpretation of its own rule, courts defer to the Commission's interpretation "unless no reasonable reading of the rule will sustain that interpretation. *Friends of the Gorge, Inc. v. Columbia River Gorge Comm'n*, 346 Or. 415, 430 (2009). Applying this standard, the court held in this case that, while a decline in the timber industry may have been anticipated when the Plan was adopted, it was appropriate for the Commission to conclude that a change in the degree and duration of that decline constituted a significant change itself, justifying an amendment to the Plan. Similarly, the court upheld a determination that a change in the extent of the need to shift from a timber-based economy to a tourism-based economy was significant. The court also held that it was appropriate for the Commission to amend the Plan based on "new information" under OAR 350-050-0030(1)(d), consisting of a high probability of contamination at the mill site and the significant costs that will be required to clean it up. The fact that such information existed when the Plan was adopted was not controlling; rather, the information was "new" simply because the Commission had not considered it before. The court also upheld the Commission's determination that the 2009 *Friends of the Gorge* case constituted a change in legal conditions sufficient to justify an amendment to the Plan under OAR 350-050-0030(1)(c). In the 2009 Friends of the Gorge case, the court held that a Plan provision allowing for the expansion of existing industrial uses in the Scenic Area under certain circumstances flatly contradicted the existing Plan in at least one respect. Finally, the court held that substantial evidence supported the Commission's findings regarding trends in recreation uses and resort development.

With regard to the second assignment of error, the court rejected challenges that the amendment to the Plan was inconsistent with the Act. This challenge was based on the fact that an earlier unused and expired development application was scaled down by the Commission prior to approval. Petitioners argued that that fact necessarily rendered the new proposal inconsistent with the Act. The court concluded that facts had changed significantly over the nearly 20 interceding years, and that the Commission's determinations were supported.

Finally, petitioners argued that the Commission inappropriately found the site to be an "existing industrial use" under the amended Plan because only the county had the authority to make such a determination. Because the Commission clearly stated that it had not made such a legal determination, which will presumably be decided in connection with future proceedings, the court also rejected this challenge.

UPDATE

Construction and Development Stormwater Rule Litigation

Jessica Hamilton, Perkins Coie
jthamilton@perkinscoie.com

On August 13, 2010, the Environmental Protection Agency ("EPA") filed a motion to vacate a large portion of its regulation relating to stormwater discharge from the construction and development industry. The EPA did so in response to litigation filed by the National Association of Home Builders, the Wisconsin Builders Association and Utility Water Act Group (collectively, "petitioners"). *Wisconsin Builders Association v. EPA*, No. 094113 (filed Dec. 28, 2009). The case, now in front of the Seventh Circuit, involves challenges to EPA's final rule entitled "Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category." 74 Fed. Reg. 62,996 (Dec. 1, 2009) ("Final Rule"). This "Final Rule" established the first enforceable effluent limitations on pollutants in stormwater from construction and development sites by requiring that discharges associated with construction activities not exceed an average turbidity for any day of 280 NTUs. The Final Rule also required monitoring as well as non-numeric effluent limitations.

As part of the litigation, EPA re-examined the dataset it relied on in coming up with the 280 NTU daily limit and concluded that it improperly interpreted the data. In its motion to the court, EPA wrote: "Based on EPA's examination of the dataset underlying the 280-NTU limit it adopted, the Agency has concluded that it improperly interpreted the data and, as a result, the calculations in the existing administrative record are no longer adequate to support the 280-NTU effluent limit." EPA's Unopposed Motion for Partial Vacature of the Final Rule, Remand of the Record, To Vacate Briefing Schedule, and to Hold Case in Abeyance, Docket # 30, Filed 8/13/2010, at 4-5.

The court has since filed a new order vacating its previous order. (Order on Petitioners' Unopposed Motion for Clarification or Reconsideration of the August 24, 2010 Order, filed 9/20/2010). This was in response to the Petitioners' motion seeking clarification of the relief granted in the court's August 24, 2010 order, which remanded the case to the EPA for further proceedings. Petitioners specifically sought to have the numeric turbidity effluent limit vacated, based on EPA's admission that it improperly interpreted the data, and that therefore the existing administrative record was no longer adequate to support the 280 NTU effluent limit. The Seventh Circuit, on September 20, 2010, ordered that the administrative record was remanded to EPA, but that the request for the court to vacate the effluent limit was denied. The court further ruled that "The EPA may make any changes to the limit it deems appropriate, as authorized by law." The court granted the request to hold the case in abeyance.

As a result of the court's ruling, the 280 NTU effluent limit is still in effect until the EPA acts further. Stated another way, although EPA has conceded its numeric effluent limit is not supported, it remains an enforceable part of the Final Rule. If the EPA does not otherwise act, the Final Rule would require construction sites that disturb twenty or more acres of land at one time to comply with the numeric turbidity limit by August 1, 2011 and construction sites disturbing ten or more acres at one time would be required to comply by February 2, 2014. In light of this, EPA is still considering its options and is expected to announce its path forward soon in order to provide guidance to states that are also undergoing their own rulemaking processes.

Primary National Ambient Air Quality Standard for Sulfur Dioxide, 75 Fed. Reg. 35,520 (June 22, 2010) (to be codified at 40 C.F.R. pts. 50, 53, 58).

Christina Davis, Attorney at Law
cldavis7@hotmail.com

On June 22, 2010, the EPA revised the sulfur oxide (SO) standards under the primary national ambient air quality standard (NAAQS). Specifically, the EPA established a new 1-hour sulfur dioxide (SO2) standard at a level of 75 parts per billion (ppb), based on the 3-year average of the annual 99th percentile of 1-hour daily maximum concentrations. The EPA also revoked both the existing 24-hour and annual primary SO standards. The EPA based its revision after review of the air quality criteria for oxides of sulfur to provide requisite protection of public health with an adequate margin of safety.

These new provisions require monitors in areas where there is an increased coincidence of population and SO2 emissions. EPA is also making conforming changes to the Air Quality Index (AQI).

The final rule became effective as of August 23, 2010. The full text of the final rule can be found online at: *http://edocket.access.gpo.gov/2010/pdf/2010-13947.pdf*.

Significant New Use Rules on Certain Chemical Substances, 75 Fed. Reg. 35,977 (June 24, 2010) (to be codified at 40 C.F.R. pts. 9, 721).

Steve Higgs, Perkins Coie
shiggs@perkinscoie.com

On June 24, 2010, the U.S. Environmental Protection Agency ("EPA") published significant new use rules (so-called "SNURs") under section 5(a)(2) of the Toxic Substances Control Act ("TSCA") for 17 chemical substances which were the subject of premanufacture notices ("PMNs"). 75 Fed. Reg. 35977 (June 24, 2010). The rule is effective on August 23, 2010. EPA identifies some of the parties potentially affected by this action as those who manufacture, import, process, or use the chemical substances addressed in this rule.

EPA explains in the preamble to the rule its authorities under Section 5(a)(2) of TSCA (15 U.S.C. 2604(a)(2)), which authorizes the Agency to determine that a use of a chemical substance is a "significant new use." EPA makes this determination by rule after considering all relevant factors, including those listed in TSCA Section 5(a)(2). Under this provision, EPA's determination that a use of a chemical substance is a significant new use is made after consideration of: (a) the projected volume of manufacturing and processing of a chemical substance; (b) the extent to which a use changes the type or form of exposure of human beings or the environment to a chemical substance; (c) the extent to which a use increases the magnitude and duration of exposure of human beings or the environment to a chemical substance; and (d) the reasonably anticipated manner and methods of manufacturing, processing, distribution in commerce, and disposal of a chemical substance. To determine what would constitute a significant new use for the 17 chemical substances addressed in these SNURs, EPA considered these four Section 5(a)(2) factors, and information about the toxicity of the substances and likely human exposures and environmental releases associated with possible uses.

As EPA explains, once it determines that a use of a chemical substance is a significant new use, TSCA Section 5(a)(1)(B) requires persons to submit a significant new use notice (a so-called "SNUN") to EPA at least 90 days before they manufacture, import, or process the chemical substance for that use. EPA's rule also includes 2 PMN substances that are subject to "risk-based" consent orders under TSCA Section 5(e)(1)(A)(ii)(I) where EPA determined that activities associated with the PMN substances may present unreasonable risk to human health or the environment. EPA notes that those consent orders require protective measures to limit exposures or otherwise mitigate the potential unreasonable risk.

EPA established the significant new use and recordkeeping requirements for the 17 chemical substances in 40 CFR part 721, subpart E. EPA provides the following information for each substance: (a) PMN number; (b) Chemical name (generic name, if the specific name is claimed as Confidential Business Information); (c) CAS number (if assigned for nonconfidential chemical identities); (d) Basis for the TSCA section 5(e) consent order or, for non-section 5(e) SNURs, the basis for the SNUR; (e) Toxicity concerns; (f) Tests recommended by EPA to provide sufficient information to evaluate the chemical substance; and (g) the CFR citation assigned to the chemical.