CASE NOTES

recent environmental cases and final rules

Environmental and Natural Resources Section OREGON STATE BAR
Editor: Micah Steinhilb April 2011

Editor's Note: This issue contains selected summaries of cases and administrative final rules issued in September, October, November, and December 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 or *steinhilb@bodyfeltmount.com*
(541)380-0293 *Bodyfelt Mount*
(503)243-1022

CONTENTS

Cases

Examilotis v. Department of State Lands, 239 Or.App. 522 (2010)

Shonee Langford – Schwabe, Williamson & Wyatt
slangford@schwabe.com

The Oregon Department of State Lands (DSL) issued a removal-fill permit to the Coos County Salmon Trout Enhancement Program Commission (Coos Step) authorizing Coos Step to move and reconstruct a fish hatchery near the petitioners' property. Petitioners and other neighbors challenged DSL's decision in a contested case hearing, arguing that DSL had failed to comply with its own rules in considering the effects of the project. DSL rejected petitioners' challenge and issued a final order and permit approving Coos Step's application. This appeal followed.

The dispute arose out of inconsistencies between the statutory standards for issuing a removal-fill permit and the standards set forth in DSL rules. The specific statute and rule at issue were ORS 196.825 (2005) and OAR 141-085-0029 (March 27, 2006), which described the controlling standards at the time Coos Step filed a revised permit application (note: the relevant wording of both the statute and rule was later amended, thus limiting the application of the decision in this case). The statute required DSL to evaluate the effects of the *proposed fill* activities, while some of the corresponding rule provisions required an evaluation of the *project* as a whole (*i.e.* the entire fish hatchery operation). DSL determined that the broader scope of the rules exceeded its rulemaking authority and limited its review to the narrower statutory approval criteria. As a result, DSL concluded that it lacked jurisdiction to address petitioners' concerns regarding traffic safety, the odor from the hatchery and flood and erosion control issues that were not directly related to the proposed fill.

The Oregon Court of Appeals agreed with DSL that the rules exceeded DSL's rulemaking authority, and also agreed that DSL did not err in choosing not to apply the broader rule-based standards. Additionally, the court rejected petitioners' argument that DSL's analysis of practical alternatives was not supported by substantial evidence in the record.

Wild Fish Conservancy v. Salazar, 638 F.3d 513 (9th Cir. 2010)

Diane Henkels – Attorney at Law
dhenkels@actionnet.net

After challenge from Wild Fish Conservancy ("Conservancy") on behalf of the bull trout, listed as threatened under the E.S.A., the U.S. Fish and Wildlife Service ("Service") Leavenworth National Fish Hatchery ("Hatchery") initiated formal E.S.A. section 7 (a)(2) for "proposed agency action;" that is, operating and maintaining the Hatchery from 2006 through 2011. The Service issued a new Biological Opinion in 2008 ("BiOp") which is the subject of this litigation. Both parties moved for summary judgment and the district court granted the Service's motion and denied the Conservancy's, and the latter appealed. The Conservancy appealed the five-year scope of the BiOp, the no jeopardy finding, and the "incidental take" permit. The Ninth Circuit concluded that limiting the scope of the BiOp to five years was arbitrary and capricious, that the Service failed to articulate a rational connection between the BiOp findings and the no jeopardy conclusion, and that the incidental take statement was inadequate.

The BiOp explained that the Icicle Creek local population of bull trout, a buffer population insulated from disturbances in the upper basin, is important to the Wenatchee River core area. This is a relative stronghold for the bull trout in the upper Columbia River interim recovery unit which is generally in decline. The survival and recovery of the Icicle Creek bull trout largely depend on the ability of the migratory bull trout to reach historically accessible spawning areas upstream of the Hatchery. Since its construction in 1939 the Hatchery has largely prevented the trout from returning to spawn.

The Ninth Circuit applied *Connor v. Burford* which rejected biological opinions addressing only the first, preliminary stage in a multistage project. The Hatchery had delineated a five-year scope based on the proposed infrastructure improvements beginning in five years that would

require new consultation. In order to avoid gradual destruction of a species, the court said the scope must be long enough for the Service to make a meaningful determination as to whether the Hatchery's ongoing operation, in cumulation, "reasonably would be expected to reduce appreciably the likelihood of both the survival and recovery" of the unit. Particularly with the long life of the Hatchery the five years was not sufficient.

The BiOp had projected that the "long-term negative population trends within Icicle Creek are likely to continue." The court found this projection contradicted the agency determination that the 2006 to 2011 operations and maintenance reasonably would not cause jeopardy at the recovery unit scale. There was no indication of how much longer the resident bull trout could hold on, and the BiOp findings did not indicate that any positive impact from the remaining small number of migratory bull trout would not be offset by the Hatchery. The BiOp also stated that the survival and recovery for the Columbia River unit requires at least maintaining distribution and stability within the core areas, and found the Service's no jeopardy finding was not rationally related to the finding that the number of bull trout in Icicle Creek would continue to decline over the action period.

Regarding the incidental take statement, the court found that the Service's not including tribal harvest of bull trout in determining the incidental take unit was reasonable given that tribal treaty rights exempt tribal anglers from the ESA so long as they follow tribal regulations. However, twenty bull trout limit established for incidental take was arbitrary and capricious because the BiOp did not specify how the Service was going to monitor and report the take in order to set a trigger for renewed consultation after take exceeds limits.

Wilderness Watch, Inc. v. U.S. Fish and Wildlife Serv., 629 F.3d 1024 (9th Cir. 2010)

Nathan Baker – Friends of the Columbia Gorge
nathan@gorgefriends.org

In this case, the Ninth Circuit held that the U.S. Fish and Wildlife Service violated the Wilderness Act, 16 U.S.C. §§ 1131–1136, by constructing two water containment structures within a designated wilderness area without first making a finding of necessity.

The FWS constructed the two structures in order to benefit bighorn sheep within the Kofa National Wildlife Refuge and Wilderness. Although it was undisputed that the structures would benefit the sheep, the plaintiffs challenged the lawfulness of their construction pursuant to the Wilderness Act, which prohibits the installation of any structure within a wilderness area, "except as necessary to meet minimum requirements for the administration of the area for the purpose of this chapter." 16 U.S.C. § 1133(c).

The Ninth Circuit first held that the conservation of bighorn sheep is a valid purpose under the Act. The court then held, however, that the FWS had failed to make an adequately reasoned determination that the two structures were the "minimum" means "necessary" to conserve the species. *Id.* The court noted that the agency's own planning documents discussed other options that would not conflict with the Act, such as ending hunting within the wilderness area, restricting hiking in areas where interference with the species could occur, addressing predation

by mountain lions, and ceasing the agency's translocation of sheep from this wilderness area to other areas. The court held that the agency had not only failed to make adequate findings addressing the relative merit of these options, but had failed to explain why the water structures themselves were necessary at all.

The Ninth Circuit remanded to the district court for further proceedings, including a determination of the appropriate remedy, given that the two structures had already been installed and the FWS had not briefed the issue of remedy at the appellate level.

Greater Yellowstone Coalition v. Lewis, 628 F.3d 1143 (9th Cir. 2010)

Andrew Schlesinger – Attorney at Law
schlesinger.andrew@gmail.com

Several environmental groups filed suit attempting to prevent the expansion of a phosphate mine operated by J.R. Simplot Company. The suit, which originated in the District Court of Idaho, challenged methodology and information used by the BLM and U.S. Forest Service in approving the expansion of the Simplot Smokey Canyon Mine. In particular the groups alleged the agencies 1) acted arbitrarily and capriciously in violation of NEPA; 2) violated NEPA's hard look and public disclosure requirements; and 3) failed to acquire a Sec. 401 certification under the Clean Water Act. The District court ruled for the agencies. On appeal the Ninth Circuit affirmed on all allegations.

Expansion of the Smokey Canyon Mine

J.R. Simplot Company ("Simplot") operates the Smoky Canyon Mine phosphate mine located partially within the boundaries of the Caribou National Forest. Currently, the mining operations encompass five panels and covers approximately 5,000 acres. Overburden and contamination from the mines resulted in an ongoing site investigation and response action under CERCLA with a focus on selenium concentrations found in nearby streams. Simplot proposed to extend the life of the mining by extracting additional phosphate from two adjacent mineral leases.

The agencies completed a Draft Environmental Impact Statement for public comment in 2005. This statement generated more than 38,000 letters. In 2007 the agencies published the Final Environmental Impact Statement. The FEIS concluded that the mine would not contribute to violations of water quality standards based upon Simplot's efforts to reduce selenium pollution seeping from existing pits and Simplot's proposed store and release cover system. The FEIS determined two areas, Pole Canyon and Panel E, were the major sources of selenium, but also the area required additional investigation. The agencies concluded Simplot's proposals to remediate these two areas would reduce the amount of selenium in a quantity at least equal to any additional pollution added by the expansion.

Additionally, in order to reduce the selenium pollution, Simplot introduced a strategy to limit future pollution by reducing the amount of water that would flow through the newly extracted waste rock. Initially this plan included the use of a cover to limit percolation. Testing indicated the percolation into the overburden required additional protections. To achieve the required percolation reduction Simplot proposed the "Deep Dinwoody Cover System" which consisted of

multiple layers of strata. The first layer included up to two feet of top soil. Next, came three feet of material from the Dinwoody Formation. Finally, Simplot would use two feet of chert, a material that encourages moisture storage. Simplot would then remove moisture by way of evaportranspiration.

Testing of the Dinwoody Cover System

Simplot hired environmental consultants to test the system. The first test used 100 years of climate data to run a one-dimensional model study that estimated annual water infiltration based on evaporation, transpiration, runoff and vertical percolation. The consultants also ran two-dimensional studies. The first was run across twenty years, including the five wettest. The second ran across 100 years but used a shortened slope length for the mine.

During the environmental review process the agencies organized a twenty-four person interdisciplinary group, of which six were tasked to water quality issues. After reviewing the independent studies provided by Simplot, one of the experts expressed concern about the results, noting that the study did not account for seasonal surges of snowmelt and/or precipitation. To study these concerns the working group hired a second consulting group. The second consultants concluded the initial studies accounted for seasonal variations by including in the inputs the peak flows, even though the output was reported on an annual basis. The Idaho Department of Environmental Quality (IDEQ) participated in the reviews and concluded the mine expansion would not result in a violation of either surface or groundwater quality standards. The agencies then approved the project.

I. The Agencies' Decision Was Not Arbitrary or Capricious

On appeal the court concluded the agencies did not act arbitrarily or capriciously in violation of the CWA and NFMA in approving the mine expansion. In reviewing the agency decision the court determined the agencies decisions were founded on a rational conclusion between the facts on the ground and choices made.

The challenging groups argued the agencies failed to adequately examine other sources of selenium beyond Pole Canyon and Panel E. Accordingly, the groups questioned the agencies' determinations that remediation of the two sites would sufficiently offset future pollution from the mine's expansion.

The court concluded the record demonstrated that the agencies fully evaluated the concerns raised by the six experts tasked to water quality issues. In particular the court relied upon the presence and conclusions of the second environmental consultants hired to review the studies provided by Simplot. The court discounted worries regarding the short term accuracy of the chosen model, the qualification did not, in the court's eyes, fail to consider an important aspect of the problem.

II. The Agencies Met NEPA's Hard Look Review Standard

The environmental groups also challenged the agencies' review of environmental factors. The groups contended the agencies should have completed a more searching review in two ways: 1) they should have used additional two-dimensional modeling to fully evaluate the concerns of one

member of the water quality task force; and 2) the agencies should have expended more resources to identify other existing sources of pollution.

The court discounted the environmental groups' first argument by concluding the requirement that Simplot complete future testing to verify the model predictions would not invalidate the evaluation conducted by the agencies. The decision to require future testing of the Dinwoody system after its modeling to confirm performance should not be construed in a manner that undermined the agency evaluations of the impacts. Further, the issuance of a license requiring the future testing provides the agencies with a means to enforce conditions should the testing reveal new information. Arguably, the agencies would be authorized to require Simplot to take corrective action.

In regard to the environmental groups' second alleged violation, the court noted that NEPA requires only evaluation of the proposed plan's future environmental impact. Therefore, because the agencies concluded the remediation efforts at Pole Canyon and Panel E would sufficiently offset future pollution additional investigation of pollution sources was not necessary.

The environmental groups also argued the agencies violated NEPA by failing to disclose internal uncertainty as to the modeling accuracy for the Dinwoody system performance. Further, the groups alleged the agencies violated NEPA by publicly denying any such uncertainty. The court rejected this argument indicating NEPA only requires acknowledgment and response to outside parties raising significant uncertainties and reasonably support the existence of such uncertainties. The court would not hold one statement indicating uncertainty within an agency technical review team represented a significant uncertainty as to the model's conclusions and predicted future pollution levels.

III. Additional Clean Water Certification Was Unnecessary

The final area of allegations raised by the environmental groups stemmed from section 401 certification requirements relevant to point source pollution under the clean water act. The court concluded this section did not apply because the mining pits protected by the cover do not qualify as a point source. The court identified two potential point sources. Before analyzing the specific potential sources the court noted prior decisions indicating congressional intent that runoff caused primarily by rainfall around activities employing or creating pollutants to be nonpoint sources. *See U.S. v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979).

The first potential point source is where water runs off the top of the cover. At this point the water entered a type of storm water drain before being released. Simplot had already obtained a 401 certification for the storm water system and therefore no additional certification was necessary.

The second potential point source occurs when some of the water seeps through the covers into the pits containing waste rock. The court concluded this discharge was nonpoint source because there is no confinement or containment of the water. The small amount of water estimated to seep into the pits is not collected or channeled but rather filters through approximately 400 to 1000 feet of various overburden and undisturbed

Humane Society v. Locke, 626 F.3d 1040 (9th Cir. 2010)

Raife Neuman – Attorney at Law
raife.neuman@gmail.com

This case centers on challenges to the National Marine Fisheries Service's (NMFS) authorization for Oregon, Washington, and Idaho to kill California sea lions feeding on threatened or endangered salmon species at Bonneville Dam on the Columbia River. The Court held that NMFS' decision was "arbitrary and capricious" under the Administrative Procedure Act (APA), vacated the agency's decision, and remanded it to the agency for further explanation. However, the court also held that NMFS did not need to perform an environmental impact statement (EIS) for the action.

Section 120 of the Marine Mammal Protection Act (MMPA) "authorize[s] the intentional lethal taking of individually identifiable pinnipeds which are having a significant negative impact on the decline or recovery of salmonid fishery stocks which … have been listed as threatened … or endangered species." Here, NMFS calculated that sea lions at the dam consumed up to approximately 17,500 salmonids annually, including 3.6% – 12.6% of listed spring Chinook and 3.6% – 22.1% of listed steelhead. Based on these observations, the agency authorized the annual taking of the lesser of 85 sea lions or "the number required to reduce the observed predation rate to [1%] of the salmonid run at Bonneville Dam."

Two critical factors underpinned the court's finding of arbitrary and capricious agency action. First, earlier environmental assessments (EA) performed by the agency had found that takes of 5.5% – 17% by tribal fisheries, and comparable takes by hydroelectric dams on the river, would have limited adverse impacts on the listed species. The court pointed out that "an agency must offer a reasoned explanation when its current course rests upon factual findings that contradict those which underlay a previous course." Second, NMFS failed to explain why a 1% predation rate would no longer constitute a "significant negative impact" under the MMPA. Based on these inconsistencies, the court remanded the plan to the agency for fuller explanation of its findings; while pointing out that the decision should not be an "undue burden" to the agency, as the APA only requires a "cogent explanation."

Plaintiffs also argued that NMFS' action required an EIS rather than the less burdensome requirement for an EA. Under the National Environmental Protection Act (NEPA), a federal agency must prepare an EIS for any "major Federal actions significantly affecting the quality of the human environment." Here, the court rejected plaintiffs' arguments that a finding of significance under the MMPA compels a finding of significance under NEPA: "although both statutes speak of significance, the legal standards under the MMPA and NEPA are distinct." Further, the court rejected arguments as lacking merit that, 1) an EIS was required based on the "controversial and uncertain nature of the action"; 2) that there were potentially lethal consequences for Stellar sea lions (unlike California sea lions, a listed species) who could be shot by accident, and 3) that local wildlife viewing opportunities would be affected at the dam.

Earth Island Institute v. Carlton, 626 F.3d 462 (9th Cir. 2010)

Todd Zilbert – Wood Tatum
taz@woodtatum.com

This is an interlocutory appeal from the district court's order denying a preliminary injunction preventing the U.S. Forest Service from post-wildfire logging in the Plumas National Forest. A divided Ninth Circuit affirmed.

After the "Moonlight" and "Wheeler" fires in the Plumas National Forest in California's northern Sierra Nevada range in the summer of 2007, the Forest Service started two projects to remove burned trees and plant seedlings.

Earth Island Institute identified the burned areas as providing "snag forest habitat" for, among others, the black-backed woodpecker. According to the court, "[t]he woodpecker can only use snag forest habitat for up to a decade after a high-intensity fire at which point in time the forest will have changed naturally and the woodpecker must seek out new suitable habitat." 626 F.3d at 467. Snag forest habitat in scarce in the Sierra Nevadas, and the Forest Service's Moonlight and Wheeler projects threatened to make it scarcer. Earth Island contended that the Forest Service projects would destroy 40-60% of the woodpecker's habitat within the recovery areas, which the Forest Service disputed.

Wrangling between Earth Island and the Forest Service led eventually to a Revised Final Environmental Impact Statement. Six months after issuing this "RFEIS," the Forest Service issued an Emergency Situation Determination that allowed it to move forward with a broad tree removal project. Earth Island sought a preliminary injunction against all aspects of the project, including felling, removal and sale of trees. The district court denied the injunction, and Earth Island Institute appealed.

The court of appeals held that the district court properly applied the four-part test of *Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008), requiring Earth Island to demonstrate (1) likely success on the merits, (2) irreparable harm absent the preliminary relief, (3) the balance of equities tipping in its favor, and (4) the injunction would serve the public interest.

As to (1), Earth Island contended it was likely to succeed on the merits because (a) the Forest Service project violated requirements for species viability and therefore the National Forest Management Act, (b) the RFEIS failed to respond to Earth Island's comments, and (c) the Forest Service failed to follow its own tree marking guidelines.

The court of appeals disagreed with Earth Island's interpretation of the Plumas National Forest Plan, specifically with its assertion that the Plan required the Forest Service to ensure viability of the woodpecker. A 2007 amendment to the Plan required habitat assessment, not species monitoring, and the record showed that the Forest Service met the habitat assessment requirement throughout the project area. Further, "[t]he district court correctly found that the Forest Service had analyzed the population distribution data in sufficient detail, concluding that the project would preserve a sufficient area to support the woodpeckers." 626 F.3d at 471. Agencies relying on scientific evidence are entitled to great deference. This finding was entitled

to great deference, and the court need only "ensure that the Forest Service made no clear error of judgment . . . ." *Id.* at 472.

As to Earth Island's comments on the RFEIS, the court of appeals said the district court cited to numerous specific instances where the Forest Service responded in detail to Earth Island comments, found five examples in the record, and said no more was required.

And Earth Island's objections to the Forest Service's failure to follow its own tree marking guidelines incorrectly assumed that the guidelines were binding and enforceable. "Here, the language of the guidelines . . . shows that they were not substantive, but provided only internal guidance and parameters for the abatement of danger from hazard trees." *Id.* at 474.

The court of appeals made short shrift of Earth Island's arguments on the remaining *Winter* requirements for a preliminary injunction, irreparable harm, balance of equities and public interest.

Judge Reinhardt dissented on two grounds. First, he found the Forest Service had an obligation to ensure woodpecker viability in the Plumas National Forest Plan, and second, the Forest Service tree marking guidelines were binding—as "the Forest Service itself acknowledges . . . ." 626 F.3d at 476. As the district court's and majority's analyses were flawed, Judge Reinhardt favored issuing a temporary injunction with instructions to the district court to reconsider the irreparable nature of the foreseeable harm and the proper scope of an injunction.

***Sacket v. U.S. Environmental Protection Agency*,** 622 F.3d 1139 (9th Cir. 2010)

Heath Curtiss – Stoel Rives LLP
hcurtiss@stoel.com

Chantell and Michael Sackett (the "Sacketts") filled in approximately one-half acre of land with dirt and rock in preparation for building a house. Approximately six months later, the United States Environmental Protection Agency ("EPA") issued a compliance order alleging that the affected lands were a wetland, and that the fill activities violated the permit requirements of the Clean Water Act ("CWA"). The compliance order required the Sacketts to remove the fill material and restore the property to its original condition, or face civil penalties of up to $32,500 per day and administrative penalties of up to $11,000 per day. The Sackets sought a hearing with EPA to challenge the finding that the lands were subject to EPA CWA jurisdiction. EPA declined. The Sacketts then sought judicial review in the U.S. District Court for the District of Idaho. The district court held that the CWA precludes judicial review of compliance orders before EPA has started an enforcement action in federal court. On appeal, the Ninth Circuit Court of Appeals affirmed.

On appeal before the Ninth Circuit, the Sacketts argued that compliance orders should be subject to judicial review and that nothing in the CWA would preclude such review. Though the CWA is silent on the issue, the Ninth Circuit sided with numerous other courts holding that the CWA impliedly precludes judicial review of compliance orders until EPA brings an enforcement action in district court. The Ninth Circuit found some comfort in a similar interpretation of the Clean

Air Act, and reasoned that judicial review of compliance orders would hinder EPA's ability to address environmental problems quickly without becoming immediately entangled in litigation.

The Sacketts also alleged that preclusion of pre-enforcement review would deprive them of their due process rights because ignoring the order would automatically lead to imposition of severe civil penalties without an opportunity to be heard. The CWA provides that "any person who violates any order issued by the Administrator . . . shall be subject to a civil penalty." 33 U.S.C. § 1319(d). The Ninth Circuit declined to interpret the statute literally, holding instead that "any order" means only those orders predicated on actual violations of the CWA as identified by a district court in an enforcement proceeding according to traditional rules of evidence and standards of proof. Thus, the Sackets would not be subject to civil penalties for failure to observe the compliance order if EPA ultimately failed to show the fill activity violated the CWA.

Finally, citing *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 (1994), the Sacketts argued that, given the difficulty of restoring the land and the very high civil penalties, "compliance [would be] sufficiently onerous and coercive penalties sufficiently potent that a constitutionally intolerable choice might be presented." The Ninth Circuit was not persuaded, citing the Sacketts' ability to obtain a permit before undertaking fill activities, and the fact that the penalties are committed to judicial discretion and would take into account a wide range of case-specific equitable factors, imposed only after the Sacketts have had a full and fair opportunity to present their case in a judicial forum.

Center for Biological Diversity v. U.S. Dept. of Interior, 623 F.3d 633 (9th Cir. 2010)

Kirk Maag – Stoel Rives LLP
kbmaag@stoel.com

The Bureau of Land Management (BLM) approved a land exchange with Asarco, a mining company. Asarco plans to operate a mine on the land it received in exchange from the United States. If the proposed land exchange does not occur, the United States will continue to own the land, and Asarco could mine only if BLM approved a Mining Plan of Operations (MPO). If the proposed land exchange does occur, Asarco will own the land and would not be required to submit an MPO to BLM for approval. Before approving the land exchange, BLM was required by the National Environmental Policy Act (NEPA) to prepare an Environmental Impact Statement (EIS). In the EIS, BLM assumed without analysis that the MPO process would impose no constraints on, and would have no effect on, Asarco's mining operations.

The Center for Biological Diversity sued BLM, alleging that BLM's approval of the land exchange violation NEPA, the Federal Land Policy and Management Act (FLPMA), and the Mining Law of 1872. The district court granted summary judgment to BLM.

On appeal, the Ninth Circuit reversed and held that BLM's assumption that mining would occur on the land Asarco received in the exchange in the same manner regardless whether the United States or Asarco owned the land was arbitrary and capricious because BLM failed to take a hard look at the environmental consequences of the exchange. Therefore, BLM violated NEPA. BLM relied on the same assumption to conclude the exchange was in the public interest, as

required by FLPMA. The Ninth Circuit held that this reliance was arbitrary and capricious and, therefore, that BLM also violated FLPMA. Judge Tallman dissented from the opinion on the ground that the majority failed to give sufficient deference to BLM's determinations.

Hapner v. Tidwell, 621 F. 3d 1239 (9th Cir. 2010)

Kelly O'Brien – Attorney at Law
kelly@kellyobrienlaw.com

The issue in *Hapner v. Tidwell* was a challenge to the Environmental Assessment ("EA") for the proposed Smith Creek project in the Gallatin National Forest of Montana. The purpose of the project stated by the U.S. Forest Service ("Service") was to reduce the risk of severe wildfires, and insect infestation and disease through logging and prescribed burning.

Plaintiffs Sharon Hapner, Native Ecosystems Council, and Alliance for Wild Rockies challenged the EA claiming violations of the National Environmental Policy Act ("NEPA"), the National Forest Management Act ("NFMA") and the Administrative Procedures Act ("APA"). The Ninth Circuit affirmed the district court's grant of summary judgment for the Service on all claims, except for the Plaintiffs' claim that the EA violates NFMA for failing to comply with the elk-cover requirements of the Gallatin Forest Plan.

For the purposes of the EA, the Service relied on two separate measurements of elk cover. However, the EA did not measure elk cover according to the definition set out in the Gallatin Forest Plan. The Gallatin Forest Plan requires two-thirds of elk cover be maintained "over time." According to the court, the Service's interpretation in this instance would allow actions to "whittle elk cover down to nearly nothing so long as each individual action removed only 33% of then-existing cover." While the court stated that the agency is normally entitled to deference to interpret their own regulations, in this instance the court determined that the interpretation of the elk cover requirement was plainly erroneous and therefore a violation of NFMA. The court remanded to the Service to remedy this error in the EA .

City of Emeryville v. Robinson, 621 F.3d 1251 (9th Cir. 2010)

Priscilla Hampton – Perkins Coie LLP
phampton@perkinscoie.com

Overview

This case involves an appeal by the Sherwin-Williams Company from an order of the United States District Court for the Northern District of California, granting in part and denying in part Sherwin-Williams' motion for declaratory and injunctive relief. Sherwin-Williams filed the motion to enforce a 2001 court-approved settlement agreement that resolved a former federal lawsuit brought by the City of Emeryville to recover site contamination cleanup costs under CERCLA. Relying on the release and contribution bar language of the 2001 settlement agreement, Sherwin-Williams sought to dismiss new claims filed by Emeryville, as well as contribution cross-claims filed by various defendants, in a subsequent state court action.

On appeal, the Ninth Circuit held that:

> 1) property owners (who were parties to the state court action but not parties to the prior federal litigation or the 2001 settlement agreement) were entitled to intervene in the instant action as of right;
>
> 2) the 2001 settlement agreement's CERCLA contribution bar did not apply to Intervenors' pending state contribution cross-claims;
>
> 3) under California law, a "good faith settlement" determination did not bar Intervenors' contribution claims; and
>
> 4) Sherwin-Williams was not a prevailing party entitled to an award of attorney fees.

Factual and Procedural Background.

The case concerns the contamination and cleanup of two adjacent sites in Emeryville, California. "Site A" was owned and operated by various potentially responsible parties, including Sherwin-Williams. Sherwin-Williams formerly owned and occupied the northern third of Site A and used the property to formulate, store and distribute pesticides. "Site B," which was owned and operated by separate PRPs who were not affiliated with Site A, borders Site A to the north.

The procedural background can be summarized by four different actions: 1) the 1999 "Site A" litigation in federal district court; 2) the 2001 settlement of the Site A litigation; 3) the 2006 state court action as to "Site B"; and 4) the instant federal court proceedings to enforce the 2001 settlement. These actions are briefly summarized below.

In 1999, after significant soil and groundwater contamination was found on Site A, the City of Emeryville sued Sherwin-Williams and other defendants in federal district court, alleging that defendants were responsible for contaminants in the soil and groundwater at, beneath, and migrating from Site A. Emeryville sought cost recovery, contribution, and damages under federal, state, and common law theories of liability. In February 2001, the district court entered an order approving a settlement agreement among the various parties, including Sherwin-Williams and Emeryville. The 2001 settlement agreement provided that, in return for remediation cost-sharing, settling defendants were entitled to "such protection as is provided in §113(f) of CERCLA." Additionally, the parties to the 2001 settlement released one another "from any and all claims, demands, actions, and causes of action arising from or related to [Site A], whether presently known or unknown, suspected or unsuspected."

In 2005, Emeryville discovered contamination at Site B, attributed in part to potential offsite sources including adjacent properties formerly occupied by Sherwin-Williams. In May 2006, Emeryville filed an action in state court, alleging that Sherwin-Williams and others were liable for hazardous substances released onto or at Site B and/or emanating to and from Site B. Emeryville relied in part on a 2005 report, which concluded that elevated arsenic at Site B's southern border was most likely due to residually contaminated soil from the former Sherwin-Williams pesticide manufacturing site (the "Sherwin-Avenue Plant"), an adjacent property that was *not* located on Site A. The other defendants, including Intervenors in the instant action and

Emeryville, each denied liability and filed cross-claims against Sherwin-Williams and each other, seeking contribution and/or indemnity.

In July of 2008, Sherwin-Williams commenced the instant action by filing a motion in federal district court to enforce the 2001 settlement. Specifically, Sherwin-Williams sought an order (1) confirming that the 2001 settlement released all of Emeryville's state court claims and provided protection against any cross-claims for contribution asserted by Emeryville and the other defendants; (2) compelling dismissal of the state court complaint and all cross-complaints; and (3) awarding attorney's fees and costs incurred by Sherwin-Williams to file the motion and defend itself in the state court action. Subsequently, numerous parties in the state court action filed motions to intervene and oppose Sherwin-Williams' motion.

Holding and Discussion.

The district court granted in part and denied in part Sherwin-Williams' motion to enforce the 2001 settlement. The motion was granted to the extent it sought confirmation that the release in the 2001 settlement applied to the claims asserted against Sherwin-Williams by Emeryville in the state court action, but only insofar as those claims arose from or related to contaminants that emanated from Site A. The motion was denied to the extent it sought an order dismissing the cross-claims for contribution and/or indemnity filed by Intervenors and other defendants in the state court action. The district court further denied both Sherwin-Williams' and Emeryville's requests for attorney's fees and costs. On appeal, the Ninth Circuit affirmed the district court's order in its entirety. The issues on appeal are as follows:

1. **Whether the district court erred by allowing Intervenors to intervene in the instant action.**

Noting that FRCP 24(a) traditionally receives a liberal construction in favor of applicants seeking intervention and that CERCLA §113(i) places the burden on the government (and not the proposed intervenor) to show that existing parties will not adequately represent the interests of the intervenor, the court of appeals held that the district court did not err in granting Intervenors' motion to intervene as of right. The court reiterated one of its prior holdings, that a contribution claim subject to extinction pursuant to CERCLA §113(f)(2) is a "significant protectable interest" warranting intervention. Here, the proposed Intervenors were neither PRPs nor parties to the Site A litigation. By intervening in the instant action, they sought to ensure their Site B state action claims would not be barred by the 2001 settlement. Because Sherwin-Williams' motion, if granted, would extinguish Intervenors' pending state law contribution and indemnity claims, the court found that the parties had a right to intervene in the instant action.

2. **Whether, as a result of the 2001 settlement, the cross-claims for contribution in the state court action are barred by CERCLA §113(f) or by the California statutes providing for confirmation of "good faith settlements."**

The court reviewed CERCLA §113(f), upon which Sherwin-Williams relied to support its argument that the district courts have broad equitable authority to bar contribution claims. The court disagreed, noting that §113(f) expressly *authorizes* claims for contribution and includes a "saving" clause that precludes any finding of preemption as to state law claims for contribution.

Further, §113(f) does not directly provide any protection *against* contribution claims. Thus, it could not serve as the statutory basis for the contribution protection claimed by Sherwin-Williams under the 2001 settlement agreement.

The court further rejected Sherwin-Williams' policy-based arguments, *i.e.*, that CERCLA's "pro-settlement policy" gives district courts authority to bar any and all contribution claims that might impede settlements. The court of appeals found that permitting Intervenors' Site B contribution claims to proceed would not undermine this pro-settlement policy, because

> CERCLA seeks to encourage settlement by penalizing identified non-settling PRPs with a bar on contribution claims, and the corresponding risk of having to pay a disproportionate share of response costs. This policy is not advanced by applying the contribution bar to Intervenors. They were not PRPs in the Site A litigation and could not have been settling parties in that action. In these circumstances, application of a contribution bar would be irrational and punitive.

Additionally, the court found that Site B contamination, and the cost of cleanup at that site, were not matters expressly contemplated by the parties in entering into the 2001 settlement. The court noted that the overwhelming majority of courts that have imposed or enforced a CERCLA contribution bar in a private-party settlement have done so only where the persons subject to the bar were either parties to the action, PRPs who were involved in or aware of settlement discussions, or non-parties who otherwise had at least constructive notice that their contribution claims could be extinguished.

Here, Intervenors were not Site A PRPs, and they had neither actual nor constructive notice of the Site A litigation or the 2001 settlement. Thus, the court rejected Sherwin-Williams' claim that § 113(f) should be construed to provide it with protection against the cross-claims for contribution and equitable indemnity asserted in the state court action. Similarly, the court found that only those non-parties with constitutionally sufficient prior notice would be bound by a "good faith settlement" determination under California law.

3. Whether the district court erred in denying its request for attorney fees against Emeryville.

The court of appeals reviewed California Civil Code Section 1717(a), which defines the "prevailing party on the contract" as "the party who recovered greater relief in the action on the contract." Conversely, a trial court "may also determine that there is no party prevailing on the contract for purposes of this section." The court also reviewed California case law, reiterating that when the ostensibly prevailing party receives only a part of the relief sought, the result is "mixed" and the trail court has discretion to find there is no prevailing party.

Sherwin-Williams argued that under California law, it was entitled to attorney's fees in the instant action, because the 2001 settlement awards attorney fees to the prevailing party on the contract and because it obtained a "simple, unqualified win" against Emeryville as to the release provision of the 2001 settlement. The court disagreed, noting that Sherwin-Williams' objectives in bringing the action were to obtain an order (1) confirming that the 2001 settlement released all of Emeryville's state court action claims against it, and (2) providing protection against any

cross-claims for contribution in the state court action. The court of appeals reiterated the district court's findings: Sherwin-Williams prevailed, in part, in its objectives as to the former (but only to the extent Emeryville was seeking to recover cleanup costs at Site B for contaminants emanating from Site A), and failed as to the latter. The court found this to be a "mixed result," and thus the district court did not abuse its discretion by denying Sherwin-Williams' fee application.

Ash Grove Cement Company v. Liberty Mutual Insur. Co., 2010 WL 3894119 (D.Or. 2010).

Samantha Gamboa – Schwabe, Williamson & Wyatt
sgamboa@schwabe.com

Insured, Ash Grove Cement Company ("Ash Grove"), brought a declaratory judgment action against several insurance companies which had issued Ash Grove commercial general liability policies for periods between 1963 and 1986. Ruling on Ash Grove and two of the insurance companies' (Liberty Mutual Insurance Company's and United States Fidelity & Guaranty Company's) cross-motions for partial summary judgment, the district court held that a request for information from the United States Environmental Protection Agency ("EPA") to Ash Grove pursuant to Section 104(e) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") constitutes a "suit" under the terms of the insurance policies, triggering the insurers' duty to defend.

The court focused on the definition of "suit" under Oregon Environmental Cleanup Assistance Act ("OECAA") ORS 465.480 in finding that the Section 104(e) request constituted a "suit" under the policies issued to Ash Grove. OECAA provides that the terms "suit" or "lawsuit," as used in generally liability insurance policies, include "any action or agreement by the Department of Environmental Quality or the United States Environmental Protection agency against or with an insured … which directs, requests or agrees that an insured take action with respect to contamination…." The Court rejected the insurers' argument that a 104(e) request was merely a request for "voluntary" cooperation, as the request contained a threat of legal action and subsequent penalties if Ash Grove failed to comply.