CASE NOTES

recent environmental cases and final rules

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

Editor's Note: This issue contains selected summaries of cases and administrative final rules issued in January, February, March, and April 2011. Thank you to all of the volunteer authors who wrote summaries for this issue.

After editing Case Notes for the past year and a half, I have decided it is time to step down and pass the torch to a new editor, Jared Ogdon. If you have any suggestions, advice, or feedback about Case Notes, I invite you to contact Jared at jaogdon@gmail.com.

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Simpson v. Department of Fish and Wildlife, 242 Or.App. 287 (2011).

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Petitioners, a group of game ranch owners, sought a declaratory ruling from ODFW. By rule, the Fish and Wildlife Commission has defined the animals owned by the ranchers, including elk, exotic deer, ibex, and water buffalo, as "wildlife." Pursuant to ORS 498.002, "Wildlife is the property of the state." The ranchers reasoned that the effect of the rule, adopted in 2007, was to

effect a taking of their animals. Following a hearing, ODFW ruled that the animals were not taken, as they were not the literal property of the state.

The ranchers petitioned for judicial review by the Oregon Court of Appeals, again contending that their animals had been taken. ODFW contended that the statute and rule merely expressed the traditional trusteeship of the sovereign over wildlife, a legal fiction that provides the basis for state regulation over hunting and other activities affecting wildlife. Accordingly, the ranchers own their animals, just as they did before the rule was adopted, subject to the police power to regulate the conditions under which the animals are held.

The court agreed with ODFW. After a lengthy historical discussion beginning in ancient Roman law, continuing with the King's deer, and culminating with Oregon precedents and statutes from 1908 to the present, the court held that the state does not own wildlife in a possessory or proprietary capacity, but as a sovereign.

Karuk Tribe of California v. United States Forest Service, 640 F.3d 979 (9th Cir. 2011).

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The Klamath River runs from Oregon, through California, to the Pacific Ocean, crossing through lands that have been home to the Karuk Tribe since time immemorial. The River is a source of cultural and religious significance to the Tribe, who depend upon it for the fish and other subsistence uses. The river is also a designated critical habitat of the Coho salmon and various other fish species. In addition, the river contains gold deposits that make it popular with small-scale recreational suction dredge gold mining.

Suction dredging uses mechanical equipment, and such equipment may not be used on federal lands without formally notifying the United States Forest Service ("USFS"). 36 C.F.R. § 228.4(a). If the USFS determines, in its discretion, that the proposed activities will likely to significantly disturb surface resources, the project proponent must submit a Plan of Operations ("PO") and conduct more detailed environmental analyses. Operations requiring a PO cannot be conducted until the USFS approves the PO.

The USFS reviewed NOIs for four proposed suction dredge operations on the Klamath River, and determined that POs were not required. The Karuk Tribe claimed that the USFS's actions violated its consultation obligations under § 7 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536(a)(2), because the operations were likely to affect a listed species, and the review constituted the type of agency action that triggers § 7.

The Ninth Circuit disagreed, concluding that § 7 was not triggered because the activities described in the NOIs were neither funded nor carried out by the USFS, and the USFS's internal decision not to require a PO does not constitute an authorization of such activities. The ESA does not operate as a blanket mandate requiring federal agencies to take affirmative steps to guarantee that species listed on the endangered species list are not harmed, and an agency's decision not to require a PO is not an "agency action" triggering a duty to coordinate and consult.

When the agency does not empower or enable the activity because a preexisting law grants the right to engage in the activity subject only to regulation, the agency's decision not to regulate is not an agency action for ESA purposes.

San Luis & Delta-Mendota Water Authority v. Salazar, 638 F.3d 1163 (9th Cir. 2011).

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Water districts and members in California (Growers) challenged the U.S. Fish and Wildlife Service's (Service) biological opinion on the effects of the Bureau of Reclamation's (Bureau) and California Department of Water Resource's coordinated operation of the Central Valley Project and State Water Project on California delta smelt. The Growers alleged, among other things, that the Service's application of Endangered Species Act (ESA) §§ 7 and 9 to the California delta smelt (a species with a range limited within California) violates the Commerce Clause of the U.S. Constitution. The biological opinion was developed under ESA § 7, and the incidental take statement of the biological opinion provided the Bureau with an exception from the prohibition of taking listed species under ESA § 9. The United States District Court for the Eastern District of California granted summary judgment in favor of defendants. The Growers appealed, and the Ninth Circuit Court of Appeals affirmed the judgment of the district court.

The district court concluded that there was no dispute that the Growers had standing to bring a claim under ESA § 7, but it determined that the Growers did not have standing to bring a claim under ESA § 9, because there was no threat of imminent enforcement under ESA § 9. The Ninth Circuit held that the Growers had Article III standing because the Service's coercive power to enforce ESA § 9 caused the Bureau to reduce water flows, which injured the Growers.

The district court concluded that the Growers' challenge was not ripe, because it characterized the challenge under ESA § 9 as a pre-enforcement challenge, which is only ripe if a plaintiff has to immediately choose between complying with newly imposed restrictions or risking serious penalties for a violation. The Ninth Circuit concluded that a pre-enforcement analysis did not apply, reasoning that the Growers' injury derived from the Services' coercive power to enforce ESA § 9, not enforcement itself. The Ninth Circuit applied a more general ripeness standard and held that the challenge under ESA § 9 was ripe because further factual development was not necessary to deal with the legal issues presented, and the Growers would suffer hardship if the court withheld consideration based on the Service's continued power to enforce ESA § 9.

On the merits, the Ninth Circuit held that "[t]he Growers' as-applied Commerce Clause challenge to ESA §§ 7 and 9 failed because the ESA 'bears a substantial relation to commerce.'" 638 F.3d at 1174 (quoting *Gonzales v. Raich*, 545 U.S. 1, 17, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005)). The Ninth Circuit provided that, based on *Raich*, "when a statute is challenged under the Commerce Clause, courts must evaluate the aggregate effect of the statute (rather than an isolated application) . . . ." *Id.* at 1175. The Ninth Circuit noted that four other circuits (the D.C., Fourth, Fifth, and Eleventh Circuits) had rejected Commerce Clause challenges to §§ 4 or 9 of the ESA. Finally, the court provided a summarized list of reasons from Ninth Circuit and other court decisions why the ESA "'bears a substantial relation to commerce": "'overutilization

for commercial . . . purposes'" might cause a species to be listed (quoting 16 U.S.C. § 1533(a)(1)(B)); the ESA prohibits all interstate and foreign commerce in listed species; "[t]he ESA protects the future and unanticipated interstate-commerce value of species"; ESA protections "might allow future commercial utilization of the species"; "[i]nterstate travelers stimulate interstate commerce through recreational observation and scientific study of [listed] species"; and "[t]he genetic diversity provided by [listed] species improves agriculture and aquaculture, which clearly affect interstate commerce". 638 F.3d at 1176-1177.

City of Los Angeles v. San Pedro Boat Works, 635 F.3d 440 (9th Cir. 2011).

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The City of Los Angeles sued San Pedro Boat Works and BCI Coca-Cola ("Coca-Cola") to recover costs the City incurred in cleaning up contamination at Berth 44, a site located in the Los Angeles Harbor. The City owned the property at all times, but argued that Coca-Cola was liable as an "owner" under CERCLA because Coca-Cola's predecessor-in-interest, Pacific American, held permits to operate a ship-building and repair facility on the site at the time pollution was discharged. The District Court granted summary judgment in favor of Coca-Cola and the City appealed. The Ninth Circuit affirmed the District Court's decision, holding that CERCLA "owner" liability "does not extend to holders of mere possessory interests in land," where the owner of the land retains "power to control the permittee's use of the real property." *City of Los Angeles v. San Pedro Boat Works*, 635 F.3d 440, 444 (9th Cir. 2011).

Berth 44 is located within the Los Angeles Harbor, which is owned by the City of Los Angeles and managed by the Board of Harbor Commissioners. In 1965, the Board issued a revocable permit to L.A. Harbor Marine Corporation, for the purpose of operating a shipbuilding and repair facility at Berth 44. In 1969, with the Board of Commissioners' consent, Pacific American purchased the permit from L.A. Harbor Marine. At the same time, Pacific American's wholly-owned subsidiary, San Pedro Boat Works, acquired the remainder of L.A. Harbor Marine's assets and began operating the boat works facility at Berth 44. After ten months, Pacific American transferred the revocable permit to San Pedro Boat Works. In 1993, Coca-Cola purchased Pacific American's assets. In 1995, the City began investigating soil and groundwater contamination at Berth 44 and performed cleanup activities in 2003. None of the parties disputed that pollution was discharged during the ten months Pacific American held the revocable permits for Berth 44, or that Coca-Cola was Pacific American's successor-in-interest for the purpose of evaluating CERCLA liability.

The Ninth Circuit began by recognizing that its prior decision in *Long Beach Unified School District v. Dorothy B. Godwin California Living Trust*, 32 F.3d 1364 (9th Cir. 1994) and the recent Supreme Court decision in *Burlington Northern & Santa Fe Railway Company v. United States*, 129 S. Ct. 1870 (2009), establish the rule that the court should look to the common law of the state where the property is located to determine the extent of "owner" liability under CERCLA. In reviewing California common law, the court concluded the law clearly distinguished between ownership interests in real property and mere possessory interests in the property. The court noted several California cases holding that easement holders and lease

holders are not "owners" of the property because easements and leases grant only limited rights to use the property and do not encompass absolute title ownership of the real property. The court reasoned that the same distinction should apply to other less-than fee-title possessory interests, such as licenses and permits.

The court rejected the "de facto ownership" analysis adopted by the Second Circuit in *Commander Oil Corporation v. Barlo Equipment Corporation*, 215 F.3d 321 (2nd Cir. 2000), which involved a complicated multi-pronged evaluation of a party's degree of control over the site. Instead, the court held that where the fee-title owner of property retains the power to control use of the property, the holder of a possessory interest in the property is not an "owner" of the property under CERCLA. The court noted that this distinction between possessory interests and ownership interests in land comported with Congress's intent in creating the categories of CERCLA liability. The court pointed to the permissiveness of the "authority to control" test for determining "operator" liability under CERCLA and reasoned "owner" liability "need not be unduly expanded to resolve situations the other liability hook was intended to address." *City of Los Angeles*, 635 F.3d at 451.

In this case, the City of Los Angeles, the fee-title owner of the property, retained the power to control the use of the property, including the power to revoke the permit, to deny permission to transfer the permit to another party, and to deny permission for the permit holder to change the use of the property. Therefore, the court ruled that Pacific American—and thus, its successor, Coca-Cola—as the holder of a mere possessory interest in Berth 44, could not be an "owner" of the property for purposes of CERCLA liability.

Barnum Timber Co. v. U.S. E.P.A., 633 F.3d 894 (9th Cir. 2011).

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In Barnum Timber Co., the Ninth Circuit held that a timber company had standing to challenge the inclusion of a stream on California's Clean Water Act Section 303(d) list of impaired waterways. Barnum Timber Co. owns and operates nonindustrial timberlands and rangelands along Redwood Creek in Humboldt County, California. Redwood Creek runs through Redwood National Park and boasts some of the most spectacular stands of old growth redwoods in the state. The State of California listed Redwood Creek as water quality limited for sediment and temperature in 1992 and has kept the creek on its Section 303(d) list since that time. California last updated its 303(d) list in 2006 and EPA approved the list in 2007. Barnum challenged EPA's approval of the continued listing of Redwood Creek as arbitrary and capricious under the Administrative Procedures Act. Barnum claimed injury from extra costs to satisfy land use restrictions triggered by the listing as well as a decrease in its property values. The district court dismissed Barnum's claim for lack of standing, holding that Barnum offered only conclusory claims of injury and had failed to show a connection between the listing and its alleged injury.

The Ninth Circuit reversed after two of the three judges on the panel found that Barnum had sufficiently met the three pronged test for constitutional standing applicable at the pleading stage. EPA conceded that Barnum met the injury-in-fact prong and the majority agreed based on two

declarations from forestry experts regarding the property value impacts of the listing. The majority also found a causal connection between the listing and Barnum's alleged injury based on the market perception that Barnum's timber operations would be restricted by the listing. Finally, the majority held that Barnum's injury was redressable because its property values would likely increase if it was successful in removing the creek from the 303(d) list.

Judge Gwin, sitting by designation, filed a lengthy dissent challenging all three prongs of Barnum's standing. The crux of his dissent was that Barnum's harm was speculative and depended on a chain of future events controlled by the state and not EPA. These events included the development of a Redwood Creek Total Maximum Daily Load and its application to Barnum.

Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127 (9th Cir. 2011).

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In this case the Ninth Circuit reversed the district courts denial of a preliminary injunction, holding that the "serious questions" approach survived *Winter* when applied as part of the four-element *Winter* test. *See Winter v. Natural Resources Defense Council*, 555 U.S. 7, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). In other words, "serious questions going to the merits" and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met.

The background of this litigation centers on August and September of 2007, when the Rat Creek Wildfire burned about 27,000 acres in the Beaverhead-Deerlodge National Forest in Montana. On July 1, 2009, almost two years later, the Chief Forester of the Forest Service made an Emergency Situation Determination for the Rat Creek Salvage Project ("the Project"). The Emergency Situation Determination permitted the immediate commencement of the Project's logging without any of the delays that might have resulted from the Forest Service's administrative appeals process.

Plaintiff Alliance for the Wild Rockies ("AWR") filed suit in federal district court alleging violations of the Appeals Reform Act ("ARA"), the National Forest Management Act ("NFMA"), and the National Environmental Protection Act ("NEPA"). In a brief order entered on August 14, 2009, the district court denied AWR's request for a preliminary injunction, holding that AWR had not shown the requisite likelihood of irreparable injury and success on the merits. The Ninth Circuit reversed the district court and directed it to issue the preliminary injunction.

In a unanimous decision, written by Judge W. Fletcher, the court concluded that that the "serious questions" version of the sliding scale test for preliminary injunctions remained viable after the Supreme Court's decision in *Winter*. The Court reasoned that AWR established a likelihood of irreparable injury if the Project continued, that AWR also established serious questions, at the very least, on the merits of its claim under the ARA, that the balance of hardships between the parties tips sharply in favor of AWR, and that the public interest favors a preliminary injunction.

Oregon Natural Desert Ass'n v. McDaniel, 2011 U.S. Dist. WL 1654265 (D. Or. April 28, 2011).

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The Oregon Natural Desert Association (ONDA) challenged the Bureau of Land Management's (BLM) decision adopting its Travel Management Plan (TMP) in the Cooperative Management and Protection Area, a 400,000 acre area containing Steens Mountain in southeast Oregon's high desert. ONDA appealed the BLM's decision adopting the TMP to the Interior Board of Land Appeals (IBLA), an appellate review body in the Department of the Interior. Before IBLA, ONDA argued that the TMP violated the Steens Mountain Cooperative Management and Protection Act (the Steens Act), the Federal Land Policy and Management Act (FLPMA), the Wilderness Act, and the National Environmental Policy Act (NEPA). IBLA reversed a portion of the BLM's TMP, but affirmed the remaining claims. After IBLA's decision, ONDA filed suit in federal District Court.

The Court requested briefing and heard oral argument on the issue of whether the BLM's decision record adopting the TMP or the IBLA's decision was the final agency action subject to judicial review. The Court then issued an order concluding that IBLA's decision constitutes the final agency action subject to judicial review, and ONDA subsequently amended its complaint to challenge both the BLM's and the IBLA's decisions as final agency actions.

The Court first addressed ONDA's Steens Act claims. In the first claim, ONDA alleged that the agency's failure to include non-motorized use and trails in the TMP violated the Steens Act's requirement that there be a "comprehensive transportation plan…, which shall address the maintenance, improvement, and closure of roads and trails as well as travel access. The Court determined that the IBLA reasonably found that the TMP addressed roads, trails, and travel access as required by the Steens Act.

ONDA's second and third claims under the Steens Act alleged that the BLM's TMP and the IBLA's decision violated the Steens Act's prohibition on off-road motor vehicle use and construction of new motorized trails. The Court found that the IBLA's decision was incomplete and inadequate to permit judicial review on the remaining Steens Act issues. The Court declined to untangle the unclear and "knotty" language in the Steens Act, which is a matter for the agency to determine first.

On ONDA's FLPMA claim, the Court ruled that IBLA limited its analysis to FLPMA's non-impairment requirement by focusing only on obscure roads. In doing so, the Court determined that the IBLA decision did not contain "adequate administrative reasoning to review," and, therefore, the IBLA's decision was arbitrary and capricious.

On ONDA's Wilderness Act claims, the Court determined the IBLA failed to address ONDA's argument that BLM's decision failed to preserve wilderness character. Again, the IBLA's decision was too incomplete to permit meaningful judicial review.

Finally, the Court addressed ONDA's NEPA claims. For three of the four NEPA claims, the Court determined that the IBLA's decision failed to sufficiently address the issues so as to allow for judicial review. Addressing ONDA's reasonable range of alternatives claim, the Court concluded that the Steens Act requires a "comprehensive transportation plan," and the purpose of the proposed action was unreasonably narrow because it only provided for alternatives that dealt with motorized travel to the exclusion of non-motorized travel. Therefore, the IBLA's decision neglected to consider the full extent of BLM's own statement of purpose and decision factors when it held that BLM need only have reviewed alternatives dealing with motorized travel.

The Court vacated the IBLA's decision and remanded it back to the IBLA for further proceedings.

Identification of Non-Hazardous Secondary Materials that are Solid Waste, 76 Fed. Reg. 15,456 (March 21, 2011) (to be codified at 40 C.F.R. pt. 241), *available at* *http://edocket.access.gpo.gov/2011/pdf/2011-4492.pdf*.

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The U.S. Environmental Protection Agency (EPA) promulgated a new rule defining when the burning of non-hazardous secondary materials is considered the combustion of solid waste and subject to Section 129 rather than Section 112 of the Clean Air Act, 42 U.S.C. 7412 and 7429 (the NHSM Rule). If the material is considered solid waste, then the combustion unit is required to meet the standards for solid waste incineration under Section 129. If the material is not considered solid waste, then the combustion unit is required to meet the standards for commercial, industrial and institutional boilers under Section 112. The final rule went into effect May 20, 2011.

Section 129 governs solid waste incineration units, providing that "solid waste" has the same meaning established under the Resource Conservation and Recovery Act. Previously, solid waste was simply "discarded material." EPA promulgated the NHSM Rule to codify the requirements and procedures to identify when non-hazardous secondary materials burned as fuel or used as ingredients in combustion units are considered solid waste under Section 129.
The NHSM Rule provides that non-hazardous secondary materials burned in combustion units are solid wastes unless the materials are (1) fuels that remain within the control of the generator and meet the legitimacy criteria; (2) scrap tires managed under established tire collection programs or resonated wood that have not been discarded and meet the legitimacy criteria; (3) used as ingredients and meet the legitimacy criteria; or (4) fuel or ingredient products from processing discarded non-hazardous secondary materials and meet the legitimacy criteria. To meet the legitimacy criteria, the fuel must (1) be managed as a valuable commodity based on storage not exceeding a reasonable time frame and adequate containment to prevent releases to the environment; (2) have a meaningful heating value and be used in a combustion unit that recovers energy; and (3) not contain contaminants in excess of those in traditional fuels that the combustion unit is deigned to burn. An ingredient must (1) be managed as a valuable commodity based on storage not exceeding a reasonable time frame and adequately contained to

prevent releases to the environment; (2) contribute a valuable ingredient to the product or intermediate or be an effective substitute for a commercial product; (3) be used to produce a product or intermediate that is sold to a third party or used as an effective substitute for a commercial product or an ingredient or intermediate in an industrial process; and (4) result in a product that does not contain contaminants in excess of those in traditional products. If the material does not meet these criteria, the Regional Administrator may also grant a non- waste determination that a non-hazardous secondary material used as fuel and not managed within the control of the generator is not discarded and is not a solid waste when combusted.