CASE NOTES

recent environmental cases and rules

Environmental and Natural Resources Section OREGON STATE BAR
Editor: Jared Ogdon January 2013

Editor's Note: This issue contains selected summaries of cases and rules issued in September, October, November, and December 2012, and January 2013. 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.

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CASES

Los Angeles County Flood Control Dist. v. Natural Resources Defense Council, Inc., __ U.S. __, No. 11-460, 2013 WL 68691 (Jan. 8, 2013), *available at* http://www.supremecourt.gov/opinions/12pdf/11-460_3ea4.pdf

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Summary reprinted with permission of and first published by Willamette Law Online at http://willamettelawonline.com/2013/01/los-angeles-county-flood-control-dist-v-natural-resources-defense-council-inc/

Petitioner operates a storm sewer system, and under the Clean Water Act (CWA) was required to obtain a National Pollutant Discharge Elimination System permit before discharging

storm water into navigable waterways. Respondents sued Petitioner arguing that monitoring stations in the Los Angeles and San Gabriel Rivers showed pollution levels that indicated Petitioner had violated the terms of its permit.

The district court granted summary judgment for Petitioner, observing that while recorded pollution levels exceeded water quality standards, the record was inconclusive as to whether Petitioner or the thousands of upstream permit holders had discharged the standards-exceeding pollutants. The Court of Appeals for the Ninth Circuit reversed, holding that Petitioner had discharged polluted water into the rivers when polluted water flowed through concrete channels that housed Petitioner's water quality monitoring stations.

On review, both parties agreed, and the Court held, that the flow of polluted water through an improved portion of a river and back into the same waterway does not constitute a "discharge of pollutants" under the CWA.

Native Village of Kivalina v. ExxonMobil, 696 F.3d 849, (9th Cir. 2012), *available at* http://www.ca9.uscourts.gov/datastore/opinions/2012/09/25/09-17490.pdf

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Summary reprinted with permission of and first published by Willamette Law Online at http://willamettelawonline.com/2012/10/native-village-of-kivalina-v-exxonmobil/

The Native Village of Kivalina and the City of Kivalina filed suit against ExxonMobil, et. al., seeking public nuisance damages under the federal common law because of extensive greenhouse gas emissions emitted by ExxonMobil and other energy producers, which has resulted in global warming and subsequently threatened the existence of Kivalina, a village of four hundred located on the northwestern Alaskan coast. Kivalina appeals the district court's dismissal of its suit. The Court found that although a public nuisance claim exists under federal common law, it is limited by the authority of Congress and when "Congress has addressed a federal issue by statute, then there is no gap for federal common law to fill." Because the Clean Air Act authorized the EPA to limit emissions from power plants, "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of such emissions." While Kivalina seeks damages and not an abatement of emissions, the Court concluded that once a cause of action is displaced by Congressional action, displacement extends to all remedies. AFFIRMED.

Earth Island Institute v. USFS, 697 F.3d 1010 (9th Cir. 2012), *available at* http://www.ca9.uscourts.gov/datastore/opinions/2012/09/20/11-16718.pdf

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Summary reprinted with permission of and first published by Willamette Law Online at http://willamettelawonline.com/2012/10/earth-island-institute-v-usfs/

The Angora Fire consumed over 3,100 acres of land in the Lake Tahoe Basin Management Unit ("LTBMU"). Defendants, the Forest Service, responded to the destruction and potential hazards caused by this fire with the "Angora Project." Plaintiffs, the Earth Island Institute, claim that the Forest Service failed to comply with the National Forest Management Act ("NFMA"), in developing the Angora Project. Plaintiffs argue that species viability

requirements of a superseded rule known as the "1982 Rule," were incorporated into the LTBMU. The Court held that the 1982 Rule requiring monitoring of species viability was not incorporated into the LTBMU, at the project level. The Court, supporting this holding, stated that the LTBMU did not expressly reference the 1982 Rule, cited a Ninth Circuit case which considered a forest plan with equivalent language that held the 1982 Rule was not incorporated, and found the Forest Service was owed deference in its interpretation of the LTBMU. Plaintiffs secondly argued that the Forest Service was still required to conduct a project level analysis of the "quantity and quality of habitat necessary" to support specific species in the LTBMU. The Court held this "quantity and quality" analysis was a form of monitoring, and therefore not a requirement at the project level in the LTBMU. The Court also found that procedural requirements of the National Environmental Policy Act were met in developing the Angora Project, and held the Forest Service's findings concerning this project were not, "arbitrary and capricious." AFFIRMED.

Native Ecosystems Council v. Weldon, 697 F.3d 1043 (9th Cir. 2012), *available at* http://www.ca9.uscourts.gov/datastore/opinions/2012/09/21/11-35659.pdf

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Summary reprinted with permission of and first published by Willamette Law Online at http://willamettelawonline.com/2012/10/native-ecosystems-council-v-weldon/

The Ettien Ridge Fuels Reduction Project ("the Project") is a project proposed by the United States Forest Service ("Forest Service") that involves cutting, logging, and burning in order to mitigate wildfire danger. Native Ecosystems Council filed suit alleging that the Forest Service violated the National Environmental Policy Act (NEPA) and the National Forest Management Act (NFMA) because of the deleterious effects the Project has on the elk hiding cover and goshawk habitats. The district court granted summary judgment in favor of the Forest Service. Native Ecosystems Council appeals. The Court used the Administrative Procedure Act's (APA) "arbitrary and capricious" standard of review. The issue was whether the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to . . . the product of agency expertise." Native Ecosystems Council's arguments and reasoning for its NEPA and NFMA claims were that the Forest Service's use of aerial photo interpretation (PI Type) methodology was invalid for assessing the true nature of the harm caused to elk hiding cover and to the goshawk population as a result of the Project. Under NEPA, an agency must consider the environmental impact of their actions and "must support its conclusions with studies that the agency deems reliable." Under NFMA, the Forest Service must "provide for diversity of plant and animal communities in managing national forests." "Given the paucity of Native Ecosystems Council's factual distinctions," the Court held that "the Forest Service's selection of the PI Type methodology did not violate NEPA" or the NFMA. AFFIRMED.

Public Lands for the People v. USDA, 697 F.3d 1192 (9th Cir. 2012), *available at* http://www.ca9.uscourts.gov/datastore/opinions/2012/09/26/11-15007.pdf

Robin Wade, Willamette Law Online
Summary reprinted with permission of and first published by Willamette Law Online at http://willamettelawonline.com/2012/10/public-lands-for-the-people-v-usda/

The Public Lands for the People ("the Miners"), a group of miners and prospectors, challenged the U.S. Forest Service's (a division of the U.S. Department of Agriculture) 2008 decision to limit the use of motor vehicles in El Dorado National Forest. The Miners claim that the restriction will adversely affect prospecting access, limit the discovery of new minerals and impinge on several existing mineral rights claims. The district court dismissed the complaint, holding that the Miners lacked standing for failing to show injury in fact. The Court disagreed, holding that the Miners could demonstrate injury in fact because they were able to show that the "access to their Federal mining claims and mineral estates had been closed" due to the 2008 decision. The Miners next argued that the Forest Service lacked the authority to limit the use of motor vehicles due to 36 C.F.R. § 228.4(a), which exempts public roads from needing a Notice of Intent to Use. The Court rejected this argument, affirming the district court's dismissal, holding that the Organic Administration Act of 1897 gives the Secretary of Agriculture the authority to "adopt reasonable rules and regulations which do not impermissibly encroach upon the right to the use and enjoyment of claims for mining purposes." Pursuant to this authority, the Forest Service used an appropriate balancing test by considering the impacts of motor vehicles on forest land and miners rights to prospect the land. Additionally, the Court acknowledged the Forest Service's wide discretion in redefining public roads, placing the roads at issue outside of the regulatory exception. AFFIRMED.

Alcoa, Inc. v. BPA, 698 F.3d 774 (9th Cir. 2012), *available at* http://www.ca9.uscourts.gov/datastore/opinions/2012/10/16/10-70211.pdf

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Summary reprinted with permission of and first published by Willamette Law Online at http://willamettelawonline.com/2012/10/alcoa-inc-v-bpa/

This case involves three consolidated petitions of review. First, Bonneville Power Administration (BPA)'s "preference" customers (Petitioners) challenged BPA's decision to sell power to Alcoa, claiming that BPA could have sold power to Alcoa at a higher market rate. Petitioners claimed that BPA's contract with Alcoa violated BPA's statutory duties and "sound business principles." In reviewing this argument, the Court examined whether "the agency considered the relevant factors and articulated a rational connection between the facts found and the choices made." The Court will not "second-guess" an agency's policy judgments and will only set aside an agency's decision if it is "contrary to clear congressional intent." In light of this standard of deference, the Court determined that BPA's contract with Alcoa was not so "arbitrary and capricious as to violate its statutory obligation." Second, Alcoa argued that BPA erred in adopting and applying the Equivalent Benefits standard to the Alcoa contract. The Court held that "Alcoa's position rest[ed] on flawed factual and legal premises." BPA has no obligation to sell power to Alcoa, did not exceed its statutory authority, and did not act arbitrarily and capriciously. Third, the Public Power Council (PPC) claimed that BPA violated the National Environmental Policy Act (NEPA) by failing to prepare an Environmental Impact Statement (EIS) in its contract with Alcoa. An EIS is not required when the action does not "individually or cumulatively have a significant effect on the human environment." The Court will inquire whether the agency considered the relevant factors and whether there was a clear error of judgment. Because BPA's contract with Alcoa did not involve any new power-generation

sources, the Court concluded that BPA's decision not to prepare an EIS was not arbitrary and capricious. DISMISSED in part and DENIED in part.

Center for Biological Diversity v. BLM, 698 F.3d 1101 (9th Cir. 2012), *available at* http://www.ca9.uscourts.gov/datastore/opinions/2012/10/22/10-72356.pdf

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Summary reprinted with permission of and first published by Willamette Law Online at http://willamettelawonline.com/2012/10/center-for-biological-diversity-v-blm/

The Ruby Pipeline project involves the construction of a natural gas pipeline extending from Wyoming to Oregon covering approximately 2,291 acres of federal land and crossing 209 rivers. The Biological Opinion formulated by the Fish and Wildlife Services ("FWS") said that the project "would adversely affect" endangered and threatened fish species living in those rivers and the designated critical habitats. However, the opinion concluded that the project "would not jeopardize these species or adversely modify their critical habitat." The Bureau of Land Management ("BLM") relied on this conclusion when it issued its Record of Decision. The Center for Biological Diversity raises challenges to the project under the Endangered Species Act, specifically, that the Biological Opinion and the Incidental Take Statement were "arbitrary and capricious." The Ninth Circuit held that the Biological Opinion is invalid because it relied on the beneficial effects of the Conservation Action Plan ("CAP") for its conclusion. The CAP did not meet the criteria for "cumulative effects" so it should not have been considered in the Biological Opinion's jeopardy decision unless it was incorporated as part of the proposed project and thus subject to enforcement provisions of the Endangered Species Act. The court also held that the Biological Opinion was arbitrary and capricious because FWS acted unreasonably when it failed to examine the impact from groundwater withdrawals which is a "relevant factor" in the jeopardy determination of endangered species. The Court further held that the FWS acted reasonably in relying on a report from 2004 and that the Incidental Take Statement that did not place a limit on eggs or fry was reasonable as well. Lastly, the court held that the BLM violated is substantive duty to ensure that the authorization of the project would not jeopardize endangered species by relying on the flawed Biological Opinion. VACATED and REMANDED.

REDOIL v. EPA, __ F.3d __, No. 12-70518, 2012 WL 6685435 (9th Cir. Dec. 26, 2012), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2012/12/26/12-70518.pdf

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Resisting Environmental Destruction on Indigenous Lands, with other environmental groups (REDOIL) challenged two permits issued by the Environmental Protection Agency (EPA) to Shell Gulf of Mexico, Inc. and Shell Offshore, Inc. (Shell). The permits allow Shell to operate a drillship and fleet off the North Slope of Alaska. The permits limit specific emissions pursuant to the Clean Air Act "best available control technology" (BACT) limits, but only for the drillship and supply vessels tied to it. REDOIL appealed the permits, arguing restrictions apply to any vessel operating within 25 miles of the drillship. The Environmental Appeals Board (EAB) denied review. Revised permits issued by the EPA exempted a 500-meter radius from "ambient air" standards, contingent on the establishment of a safety zone and other public access

requirements. REDOIL again appealed, challenging the exception, and EAB dismissed the appeal. REDOIL sought review of both EAB decisions. The Court found the drillship is an "Outer Continental Shelf source" pursuant to a plain reading of the statute, subject to BACT limits. The Court also found Congress did not intend support vessels unattached to the OSC source be regulated because they are not OSC sources themselves. In addition, the Court interpreted the statute to distinguish between stationary and mobile sources, upholding the EAB ruling that BACT does not apply to vessels moving freely. The Court held the Act is ambiguous regarding vessels unattached to the OSC source, and focused on EPA's reasonableness in interpreting the statute. The Court deferred to the EPA, and agreed BACT does not apply to mobile, unattached vessels. The Court held the grant of the 500 meter ambient air exception was not "plainly erroneous" and was, in fact, consistent with agency regulation, and the condition of an effective safety zone is a permissible interpretation. PETITION DENIED.

RULES

2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 77 Fed. Reg. 62,624 (Oct. 15, 2012), *available at* http://www.gpo.gov/fdsys/pkg/FR-2012-10-15/pdf/2012-21972.pdf

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The Environmental Protection Agency (EPA) and the National Highway Traffic Safety Administration (NHTSA) issued final rules on October 15, 2012, regarding the 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards. This rulemaking will affect companies manufacturing light-duty vehicles and trucks and medium-duty passenger vehicles defined under the Clean Air Act regulations, and passenger and non-passenger automobiles defined under NHTSA's Corporate Average Fuel Economy regulations.

The EPA's new standards will require 163 grams per mile of carbon dioxide in model year 2025 based on an average industry fleet wide. This would be equal to 54.5 miles per gallon (mpg) if it was obtained only through improving fuel efficiency. The NHTSA through the rulemaking has set two phases of standards for passenger cars and light trucks. The first phase is for model years 2017-2021, including the final standards which will require 40.3 to 41.0 mpg in model year 2021 based on an average industry fleet wide. The second phase for model years 2022-2025 includes augural standards, which are not final and are based on information currently available to the NHTSA as to what may be feasible for those model years. This second phase of standards is projected to potentially require in model year 2025 a range from 48.7 to 49.7 mpg.

The agencies will also undertake a mid-term evaluation and decision-making process for the standards for model years 2022-2025. The agencies' rules also include provisions that provide compliance flexibility to car manufacturers. This includes the ability to generate credits when manufacturers over-comply with the standards and the ability to bank and trade those credits. Further, the EPA's rules establish the maximum total air conditioning credits available, allow manufacturers to generate and utilize off-cycle credits, and provide incentives for electric vehicles, plug-in hybrid vehicles, and fuel cell vehicles for model years 2017 through 2021.