

# ENR Case Notes, Vol. 28

Recent Environmental Cases and Rules

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Devin Franklin, Editor

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*Editor's Note: This issue contains selected summaries of cases issued in October, November, and December of 2016.*

*A special thank you to our talented contributors for their summaries: Oliver Stiefel of Crag Law Center, Steve Thiel of the Law Offices of Steven M. Thiel, Cody Gregg of Willamette University Law School, Alexa Shasteen, and Devin Franklin. If you are interested in summarizing cases or rules, please do not hesitate to contact me.*

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## 9th Circuit Court of Appeals

- ***Alliance for the Wild Rockies v. Krueger***, No. 14-35350, 2016 WL 7030690 (9<sup>th</sup> Cir. Dec. 2, 2016).
- ***Great Basin Res. Watch v. U.S. BLM***, -- F.3d --, No. 14-16812, 2016 U.S. App. LEXIS 23337 (9th Cir. Dec. 28, 2016).

## District of Oregon

- ***Cascadia Wildlands v. Scott Timber***, No. 6:16-CV-01710-AA, 2016 U.S. Dist. LEXIS 174971 (D. Or. Dec. 19, 2016).
- ***Juliana v. United States***, No. 6:15-cv-01517-TC, 2016 WL 6661146 (D. Or. Nov. 10, 2016).
- ***Rogue Advocates v. Mountain View Paving***, No. 1:15-cv-01854-CL, 2016 WL 6775636 (D. Or. Nov. 11, 2016).

## Oregon Bulletin

- ***Expanding Water Protection Rules to Include Small and Medium Salmon, Steelhead and Bull Trout Streams*** (Sept. 15, 2016).

## A. 9<sup>th</sup> Circuit Court of Appeals

1. *Alliance for the Wild Rockies v. Krueger*, No. 14-35350, 2016 WL 7030690 (9<sup>th</sup> Cir. Dec. 2, 2016). *Author*: Devin Franklin.

The Ninth Circuit affirmed the district court's grant of summary judgment to the Defendants, U.S. Forest Service, et al..

The district court action commenced when Plaintiffs, Alliance for the Wild Rockies and the Native Ecosystem's Council, sought to enjoin the Forest Service's implementation of a vegetation project in Helena National Forest in Montana. Plaintiffs asserted that the Cabin Gulch Vegetation Project ("Project") violates the Endangered Species Act ("ESA"), the National Forest Management Act ("NFMA"), and the National Environmental Policy Act ("NEPA"). The district court granted summary judgment to Defendants on all but one of the claims; finding that the Project, as it was, did in fact violate Section 7 of the ESA. The Project was temporarily enjoined until Defendants remedied the violation and the district court granted their motion to dissolve the injunction.

The first issue on appeal was whether the Forest Service violated NFMA when it concluded that the Project was not likely to adversely affect elk habitat in Helena National Forest. The court held that the Forest Services' reliance on the Christensen ("Elk Management in the Northern Region: Considerations in Forest Plan Updates or Revisions," Alan Christensen et al., 1993) and Hillis ("Defining Elk Security: the Hillis Paradigm," Hillis et al, 1991) studies was proper because these studies are the best available science regarding elk habitat. Furthermore, the record was void of any indication that the agency ignored other relevant data. In concluding that the Forest Service complied with NFMA, the court emphasized that it must defer to the expertise of the agency, rather than attempt to make such scientific judgments and technical analyses itself.

Next, the court considered whether the Forest Service's Amendments to the Forest Plan met NFMA requirements. Here, the court said the 2000 NFMA regulations, which were in place when the Project was adopted and the Amendments approved, allowed the Forest Service to use 1982 rule procedures when amending the Project's Forest Plan. Moreover, when an amendment constitutes an insignificant change from the original Forest Plan, the 1982 regulations authorize the Forest Service's implementation of a Forest Plan amendment so long as it properly notifies the public and complies with NEPA procedures. The court held the Forest Service acted in accordance with the 1982 regulations when it amended the Project's Forest Plan.

The court also addressed the Plaintiffs' claim that the Project's Environmental Impact Statement ("EIS") failed to address the cumulative impacts of the Project on the surrounding environment and, therefore, the Forest Service's dependence on it was arbitrary and capricious. The court found the Forest Service did in fact adequately address the environmental impacts of the Project when it considered and summarized the "spatial and temporal boundaries, how past activities have contributed to the existing condition, and whether the ecosystem can accommodate additional effects."

Finally, the court denied Plaintiffs' claim that the district court abused its discretion when it denied Plaintiffs' motion to supplement the administrative record with a newspaper article discussing alleged grizzly sightings within the Project's parameters. The court agreed with the lower court's determination that the newspaper article did not provide any additional probative information to verify these sightings and, as such, it was proper for the court to exclude it from the record.

2. ***Great Basin Res. Watch v. U.S. BLM***, -- F.3d --, No. 14-16812, 2016 U.S. App. LEXIS 23337 (9th Cir. Dec. 28, 2016). *Author*: Oliver Stiefel, Crag Law Center.

Plaintiffs/Appellants ("Great Basin") challenged the Bureau of Land Management's ("BLM") approval of a mining operation in central Nevada ("Project"). On claims under the National Environmental Policy Act ("NEPA"), the Federal Land Policy and Management Act ("FLPMA"), and the Executive Order known as Public Water Reserve No. 107 (Apr. 17, 1926) ("PWR 107"), the District Court granted summary judgment in favor of the BLM. In a unanimous opinion (Graber, J.), the Ninth Circuit affirmed in part, reversed in part, vacated in part and remanded with instructions to vacate the record of decision and remand to the BLM.

The court first held that the BLM's analysis of air impacts in the Final Environmental Impact Statement ("FEIS") was inadequate because the BLM did not provide any support for its use of baseline values of zero for several air pollutants. These baseline estimates were founded on nothing more than the bare assertion of opinion from a state agency official. Without any explanation from the official as to why the estimates were appropriate, or any independent evaluation and explanation by the BLM that the estimates were reasonable, the BLM had failed to support its baseline estimates with "accurate information and defensible reasoning." The BLM argued that it corrected any error in its baseline estimates by conducting a post-EIS "double check" analysis, but the court explained that a post-EIS analysis without public input could not cure deficiencies in an EIS. The court also clarified that the fact that the Project had obtained a Clean Air Act permit did nothing to fix the baseline error, because a non-NEPA document cannot satisfy a federal agency's obligations under NEPA.

Next, the court held that the FEIS's cumulative impacts analysis did not comply with NEPA. The BLM took the required first step of identifying relevant past, present, and reasonably foreseeable future actions that may affect the environment in the Project area. But in the cumulative air impacts portion of the FEIS, the BLM failed to take the required next step of enumerating the environmental effects of other projects or considering the interaction of multiple activities. In particular, the BLM made no attempt to quantify the cumulative air impacts of the Project together with other regional activities, including another mining project, vehicle emissions, and oil and gas development.

The court next considered three issues related mitigation. The court first upheld the BLM's "wait and see" approach with respect to mitigating negative impacts to future water users from the eventual mine-pit lake. According to the court, where the adverse impact was predicted to be insignificant and would not occur for decades, the BLM reasonably relied on a monitoring scheme for development of future mitigation measures. Next, on the question of whether the

BLM adequately addressed long-term mitigation and reclamation funding, the court found the FEIS's discussion to be reasonably complete. Although the court rejected the BLM's argument that long-term funding mechanisms, including a reclamation bond, need not be discussed in an FEIS, the court found that the FEIS included a relatively thorough discussion of possible reclamation measures, and contained assurances that the funding mechanism would be reviewed annually and potentially increased to meet monitoring and mitigation needs. Finally, the court considered Great Basin's challenge to the adequacy of the BLM's discussion of mitigation measures to address potentially significant impacts to surface and ground water quantity. The court declined to reach the issue because there were factual issues underlying the claim that raised the specter of harmless error, but no party had briefed harmlessness, and because the BLM's NEPA analysis was deficient in other respects.

The court also declined to address Great Basin's substantive FLPMA and PWR 107 claims, for two reasons. First, the court noted that BLM should be given an opportunity to fix the errors in its analysis of the Project under NEPA before challenges to the Project itself are entertained. According to the court, "NEPA is not a paper exercise, and new analysis may point in new directions." Second, the court found that the agency's position on a key factual issue was unclear. In these circumstances, the court found it more appropriate to remand to the agency to clarify its position, rather than to address legal questions that may end up being irrelevant.

## **B. District of Oregon**

1. ***Cascadia Wildlands v. Scott Timber***, No. 6:16-CV-01710-AA, 2016 U.S. Dist. LEXIS 174971 (D. Or. Dec. 19, 2016). *Author*: Steve Thiel, The Law Office of Steven M. Thiel, LLC.

Environmental groups, including Cascadia Wildlands, the Center for Biological Diversity, and the Audubon Society of Portland (collectively, "Cascadia") sued Scott Timber Co. and Roseburg Forest Products (collectively, "Scott Timber"), alleging violations of the Endangered Species Act ("ESA"), 16 USC §§ 1531, *et seq.* Cascadia moved to enjoin Scott Timber's planned clearcut logging project on forty-nine acres of former state forestland. In this opinion and order, Judge Ann Aiken ruled in favor of Cascadia, granting its motion for preliminary injunction.

In 2013, Scott Timber successfully bid to purchase two tracts of the Elliot State Forest from the Oregon State Land Board. Prior to the sale, Cascadia sent a letter to Scott Timber stating that the land was occupied by marbled murrelets, a bird listed as threatened under the ESA. Cascadia informed Scott Timber that it intended to sue the company if it logged the tracts. Despite Cascadia's letter, Scott Timber completed its purchase of the two tracts, at which point Cascadia sent another notice reiterating its intent to sue should Scott Timber proceed to log the parcel. The parties disagreed as to whether the former state forest land (the "Benson Snake" area) is occupied marbled murrelet habitat. Anticipating Cascadia's lawsuit, Scott Timber hired a consulting firm to study whether the birds were present at Benson Snake. That study, known as the WEST Study, concluded that the area was not used for nesting by marbled murrelets in

2015 and 2016, and so Scott Timber could clear cut the land without harming the species. Conversely, Cascadia claimed that Benson Snake is occupied by marbled murrelets, relying on a survey it conducted in 2014. In that survey, based on a protocol for surveying marbled murrelets created by the Pacific Seabird Group (“PSG Protocol”), Cascadia observed a single pair of marbled murrelets flying across Benson Snake at canopy height. According to the PSG Protocol, such a sighting qualifies Benson Snake and all habitat contiguous to it as “occupied” by the birds. Relying on their PSG Protocol survey, Cascadia brought this suit.

Scott Timber began by arguing that Cascadia failed to provide proper notice of this action as is required by the ESA. Specifically, the defendants asserted that the Cascadia’s letters were insufficient notice because they were sent to Scott Timber before the Benson Snake logging project had been planned. Cascadia argued that the notice was valid and timely because it accomplished the purpose of the notice requirement to prevent harm to a listed species before it occurs. The court sided with Cascadia, concluding that the measure of proper ESA notice is whether it “provided sufficient information to allow the defendant to detect and address the alleged violation, bearing in mind the defendant’s greater access to information about its own activities.” Here, the letters were mailed at least 60 days prior to initiating the action and, despite there being no concrete plan to log the tracts, Scott Timber, as a logging company, clearly purchased the land for that purpose. Moreover, Scott Timber showed that it understood the nature of Cascadia’s notice when it commissioned the WEST Study in anticipation of litigation.

Scott Timber then challenged Cascadia’s standing to bring the suit. The court concluded that Cascadia and its members satisfied all of the requirements of standing. The prospect of the complete clearcut of the Benson Snake parcel presented an imminent threat that could significantly diminish the plaintiff’s ability to hear and observe the birds, even from adjacent public land. Further, the defendant’s planned logging project would be the cause of that harm, which would not occur if Cascadia were successful in its action.

Finally, the court considered whether it would be appropriate to temporarily enjoin the logging project. As the court explained, the 9<sup>th</sup> Circuit has provided two standards for granting a preliminary injunction. The “traditional” standard requires a plaintiff to establish a likelihood of success on the merits, and that the balance of equities tips in its favor. Under the “alternative” standard, a plaintiff must show merely “serious questions” regarding the merits, but also a “balance of hardships” strongly favoring the plaintiff. Whichever standard is applied, the plaintiff must also show a likelihood that the plaintiff will suffer irreparable injury in the absence of an injunction, and that an injunction is in the public interest. Here, the court chose to apply the “alternative” standard.

The court concluded that Cascadia raised serious questions going to the merits of the action. Clearly, if the Benson Snake is occupied by marbled murrelets, its complete clearcutting would significantly degrade and modify the species’ habitat. That would constitute unlawful “take” under the ESA. And, although Scott Timber provided its own contrary study, Cascadia’s PSG Protocol survey raised questions that cannot be resolved at the injunction hearing and, thus, are serious questions going to the merits. Similarly, the question of the likelihood of irreparable harm hinges on whether marbled murrelets occupy the Benson Snake Parcel. Because the “irreparable harm” and “serious questions” factors “are bound together,” the court concluded that

Cascadia satisfied the former by showing the latter. The court then disposed of the “balance of hardships” factor. Citing *TVA v. Hill*, 437 U.S. 153 (1978), the court explained that, in ESA cases, “the balance of hardships automatically tips in favor of the endangered species.” Because the potential hardships facing the marbled murrelets align with Cascadia’s potential hardships, the balance tips in the plaintiff’s favor. The same reasoning applies to the final factor, the public interest. “Like the balance of hardships,” Judge Aiken wrote, “the public interest factor always weighs in the species’ favor.” Thus, Cascadia met the requirements of the “alternative” standard, and its motion for a temporary injunction was granted.

2. ***Juliana v. United States***, No. 6:15-cv-01517-TC, 2016 WL 6661146 (D. Or. Nov. 10, 2016). *Author*: Cody Gregg, Willamette University Law School.

Plaintiffs – a group of youths between ages eight and eighteen; Earth Guardians, an association of young environmental activists; and Dr. James Hansen, acting as guardian for future generations – brought a civil rights action against the United States, the President, and numerous executive agencies for: (1) violations of their substantive due process rights, and (2) violation of obligations to hold certain resources in public trust for the people and future generations. Plaintiffs allege that Defendants have known for over 50 years that carbon dioxide (CO<sub>2</sub>) produced by burning fossil fuels was destabilizing the climate system in a way that would significantly endanger Plaintiffs. Despite this knowledge, Plaintiffs contend, Defendants permitted, encouraged, and enabled exploitation, production, and combustion of fossil fuels until CO<sub>2</sub> concentration escalated to unprecedented levels causing actual harm to Plaintiffs. Defendants and intervenors moved to dismiss for lack of subject matter jurisdiction and failure to state a claim. Magistrate Judge Coffin issued Findings and Recommendations (F & R) recommending denying the motion to dismiss. After objections and oral arguments, the district court adopted the F & R and denied the motions to dismiss.

Defendants and intervenors asserted that the court lacked jurisdiction because the case presented non-justiciable political questions, plaintiffs lacked standing, and federal public trust claims cannot be brought against the federal government. In addressing the political question doctrine, the court first noted that just because an issue is of great importance to the political branches, does not mean (as the government appeared to contend) that it presents a political question. The court proceeded to discuss in detail each of the *Baker* criteria finding that neither environmental policy, atmospheric emissions, nor global warming is textually committed in the Constitution to a coordinate branch. The court criticized the Defendant’s contention that because the Constitution gives the political branches authority over commerce, foreign relations, national defense, and federal lands – all areas affected by climate change policy, there is necessarily a political question. The court explained that if the first *Baker* factor applied in any cases relating to these topics, then nearly all legislation and executive action would be shielded from judicial scrutiny.

The court further declared itself fully competent to determine the maximum emissions level sufficient to redress Plaintiff’s injuries and therefore shape the relief sought by the Plaintiffs without engaging in policy determinations. After dispensing with the remaining *Baker*

considerations, the court proceeded to eviscerate any doubt that the Plaintiffs sufficiently alleged standing for the purpose of surviving a motion to dismiss.

The Plaintiffs had standing under *Lujan*. While the court discussed each factor in turn, the brunt of the court's discussion focused on causation. Defendants alleged that the causal relationship between Plaintiffs' injuries and their regulatory decisions was too attenuated. Finding this unpersuasive, the court distinguished the United States (who Plaintiffs assert is a major player in production of greenhouse gasses) from five power plants creating just six percent of greenhouse gasses in a Washington State case brought on similar due process grounds. In that case, summary judgment was granted to defendants for plaintiffs' failure to establish a causal link. Here, the court reasoned that at the motion to dismiss stage it would be inappropriate to conclude a lack of causation where it was plainly pleaded and reasonable inferences were to be drawn in favor of the complaint.

Both the due process claims and public trust claims were actionable. The Defendants and intervenors asserted that challenges to the Defendants' affirmative actions could not proceed because Plaintiffs failed to identify infringement on a fundamental right or discrimination against a suspect class of persons. The court disagreed finding that a fundamental right exists to a climate system capable of sustaining human life. Additionally, the court held that the Defendants' could be liable for their inaction under the "danger creation" exception to the general presumption against an affirmative governmental duty to act. Under this theory, a plaintiff must allege that a state actor:

- (1) Created or exposed the individual to a danger which he or she would not have otherwise faced;
- (2) Recognized the unreasonable risk to the individual, and;
- (3) Acted intentionally to expose them to the risk with indifference to the possibility of injury.

By these standards, the court concluded the Plaintiffs adequately alleged a theory of due process infringement based on state inaction (however acknowledging the high bar facing the Plaintiff's in proving each element).

Finally, addressing the public trust claim, the court determined both that the public trust doctrine applied to the Federal government, and that the Plaintiffs adequately pleaded a breach of duty by the government as fiduciaries. The court's public trust claim analysis asserted its clear application to the territorial sea and lands beneath tidal waters, however, explicitly not foreclosing on other applications. With regard to enforceability of the public trust doctrine, the court found that the claim falls within substantive due process and is therefore actionable in Federal Courts.

3. ***Rogue Advocates v. Mountain View Paving***, No. 1:15-cv-01854-CL, 2016 WL 6775636 (D. Or. Nov. 11, 2016). *Author*: Cody Gregg, Willamette University Law School.

Plaintiffs, Rogue Advocates, brought suit against Mountain View Paving for violations of the Clean Air Act (“CAA”) arising out of their operation of an asphalt batch plant, and associated activities, in Jackson County, OR. Plaintiffs contended that through operating the plant in violation of local land use ordinances, Defendant violated the terms of their federally enforceable Oregon Department of Environmental Quality (“DEQ”) Air Contaminant Discharge Permit (“ACD permit”). Plaintiffs sought declaratory relief, injunctive relief, and civil penalties. Defendant filed for summary judgment on all issues arguing that they had County approval to operate the plant at all relevant times and that Plaintiff’s claims were moot because Defendant moved their batching operations to a separate facility after terminal denial of their application for a zoning variance. Additionally, Defendant maintained that lacking County approval amounts to only a technical violation of their State permit and because land use approvals are committed exclusively to the County and Land Use Board of Appeals, the district court lacked jurisdiction to adjudicate the claims under the CAA. Plaintiffs filed for summary judgment as to whether Defendant violated the CAA.

The court quickly dispensed with Defendant’s jurisdictional argument explaining that the DEQ permit standards, which are part and parcel to the Oregon State air quality implementation plan required by the CAA and approved by the EPA, are a matter of Federal law. However, the court found that the Plaintiff’s claims for declaratory relief, injunctive relief, and civil penalties were mooted by Defendant’s relocation of the batch plant. Notably, the court – relying on cases interpreting the identical penalty provisions in the Clean Water Act – held that civil penalties under the CAA exist to deter future violations as an alternative to injunctive relief. Due to Defendant’s efforts to be compliant with land use laws (as well as their ceasing of plant operations upon denial of their nonconforming use application), the court found that it was absolutely clear that wrongful conduct could not reasonably be expected to recur. Having no future action to deter mooted claims for civil penalties. The court did find that where the Defendant, in violation of local land use laws, continued to use the land for storage of raw materials related to the batching operation, a material fact existed as to whether these accessory activities constituted a violation of the CAA for failure to fulfill the ACD permit requirements of compliance with local laws. The court denied Defendant’s motion for summary judgment on this issue alone.

### C. Oregon Bulletin

1. ***Expanding Water Protection Rules to Include Small and Medium Salmon, Steelhead and Bull Trout Streams*** (Sept. 15, 2016). *Author*: Alexa Shasteen.

The Oregon Board of Forestry (“Board”) is tasked with establishing rules to ensure that to the maximum extent practicable, forest operations do not impair the water quality standards set by Oregon’s Environmental Quality Commission (“EQC”). One such rule, established in the 1980s, provides for “buffer” zones to ensure the areas around streams remain shaded by trees.

This is necessary to prevent the water from warming, which can be harmful to fish. Beginning in the early 2000s, the Board undertook studies, which revealed that forest operations on private lands resulted in streams warming by 0.7 degrees Celsius, exceeding EQC's Protecting Cold Water Temperature Standard, which allows for warming only up to 0.3 degrees.

The Board decided to address this by increasing buffer and tree retention standards on streams that: (1) were west of the crest of the Cascades, excluding the Siskiyou region, (2) were classified as a small or medium fish-bearing stream, and (3) had Salmon, Steelhead, and/or Bull Trout ("SSBT") present. The Board's proposal does not apply to the Siskiyou area or Eastern Oregon because the Board concluded there was insufficient data to establish the need for a rule change in those regions. The Board is expected to announce in mid-2017 a plan for developing rules for those regions.

The Board established a Riparian Rulemaking Advisory Committee ("RRAC") to develop the actual rule language. In September 2016, the Board accepted the RRAC's proposed language. The proposed rule requires the retention of: (1) all understory vegetation within 10 feet of a stream's high-water level, (2) all trees within 20 feet of a stream's high-water level, and (3) all trees leaning over the stream channel. Beyond the 20-foot buffer is an additional 40-foot buffer for small SSBT streams and a 60-foot buffer for medium SSBT streams where some thinning of trees will be permitted.

The proposed rule is expected to result in a 0.3 to 0.4 percent decrease in the 20-year annual average private softwood harvest. The proposed rule is not expected to result in full compliance with the Protecting Cold Water Temperature Standard, which would likely require close to 100-foot no-harvest buffers on either side of a stream.

Public comment on the proposed rule closes on March 1, 2017 at 5:00PM. Comments may be sent to: Private Forest SSBT Rulemaking, Oregon Department of Forestry, 2600 State Street, Oregon 97310, RiparianRule@oregon.gov, or faxed to (503) 945-7490.