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Recent Environmental Cases and Rules

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Editor's Note: This issue contains selected summaries of cases issued in April, May, and June of 2017.

A special thank you to our talented contributors for their summaries: Lia Comerford of the Earthrise Law Center, Andrea Goodwin of the Oregon Department of Transportation, Oliver Stiefel of the Crag Law Center, Mark Tuai of Lewis and Clark Law School, Cody Gregg of Willamette University Law School, and Alexa Shasteen of Marten Law. If you are interested in summarizing cases or rules, please do not hesitate to contact me.

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9th Circuit

1. ***Alliance for the Wild Rockies v. Ashe, --- Fed.Appx. ---- No. 14-35936, 2017 WL 1404712 (9th Cir. Apr. 20, 2017).*** *Author:* Lia Comerford, Earthrise Law Center.

In April 2012, the U.S. Forest Service approved the Young Dodge Project in the Kootenai National Forest in Montana, authorizing forest management activities on approximately 7,000 acres of the Project area, including logging of 3,000 acres and prescribed burning of approximately 6,500 acres. *See Order at 2, Alliance for the Wild Rockies v. Ashe, No. 9:13-cv-00092 (D. Mont. Sept. 26, 2014), Doc. 66*. Plaintiff Alliance for the Wild Rockies subsequently

brought suit, alleging that the Forest Service and U.S. Fish and Wildlife Service (collectively, the "Agencies") violated the Endangered Species Act ("ESA") and the National Environmental Policy Act ("NEPA"), and the Administrative Procedure Act ("APA") in approving the Project, which would partially take place on protected grizzly bear habitat. *See generally, id.* Specifically, Plaintiff argued that the Agencies violated ESA Section 7 in their consultation regarding the adverse effects of the Project on grizzly bears and Canada lynx and thus that the Agencies' action was arbitrary and capricious and/or unlawfully withheld or unreasonably delayed under the APA; that the Project would result in unauthorized take of grizzly bears in violation of ESA Section 9; that the Agencies did not evaluate the cumulative effects of the project as required by NEPA and thus the Agencies' action was arbitrary and capricious and/or unlawfully withheld or unreasonably delayed under the APA; and that the Agencies violated ESA Section 7(d) by irreversibly and irretrievably committing resources to the Project before completing lawful ESA consultation. *Id. at 6–8, 15, 17*; *see also generally, First Amended Complaint, Alliance for the Wild Rockies v. Ashe, No. 9:13-cv-00092 (D. Mont. Sept. 9, 2013), Doc. 19*.

Judge Molloy of the U.S. District Court for the District of Montana granted summary judgment to the Agencies, finding that the Agencies fully complied with the ESA and NEPA in approving the Project. *Id. at 20*. The Court also held that Plaintiff had not preserved its NEPA argument for judicial review because it had not exhausted its administrative remedies prior to bringing suit. *Id. at 16*.

In April 2017, the Ninth Circuit affirmed the two aspects of the district court's decision appealed by Plaintiff. *See generally, Alliance for the Wild Rockies v. Ashe, No. 14–35936, 2017 WL 1404712 (9th Cir. 2017)*. The Ninth Circuit first considered whether the district court erred in determining that the Agencies satisfied their obligations under ESA Section 7, which requires federal agencies to ensure that their actions are "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." *16 U.S.C. § 1536(a)(2)*. The Ninth Circuit determined that the Agencies had independently considered impacts to grizzly bears from the non-road related activities of the Project and that the Agencies' analyses of the potential impacts were "rationally related" to the conclusion that the Project would have no adverse effects on grizzly bears. *2017 WL 1404712 at *1*. The Ninth Circuit reached this decision after independently reviewing the administrative record, *2017 WL 1404712 at *3*, and noted that even though part of the Agencies' analysis was somewhat conclusory, "the agencies' 'path may reasonably be discerned' from other evidence in the record*." Id. at *2, quoting Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)*. The Ninth Circuit then affirmed the district court's conclusion that Plaintiff had waived its NEPA argument by failing to exhaust its administrative remedies. *Id*.

2. ***In re Big Thorne Project, 857 F.3d 968 (9th Cir. May 23, 2017).*** *Author:* Andrea Goodwin, Oregon Department of Transportation.

Plaintiffs brought suit against the United States Forest Service ("Forest Service") claiming violations of the National Forest Management Act ("NFMA") for approval of the Big Thorne Project or the 2008 Tongass Forest Plan ("Forest Plan") under which the Big Thorne Project was

authorized. The District Court granted summary judgment in favor of the Forest Service and Plaintiffs appealed. The Ninth Circuit affirmed the judgment of the District Court.

As explained by the Court, under the NFMA, the Forest Service must develop land and resource management plans, referred to as forest plans, for each national forest. All subsequent agency actions within that national forest must comply with both the NFMA and the relevant forest plan. The Big Thorne Project authorized timber to be harvested from Alaska's Prince of Wales Island. Plaintiffs alleged the project unlawfully impacted the Alexander Archipelago wolf populations.

After briefly discussing and concluding the Plaintiffs had standing to bring the action, the Court considered whether the Forest Service violated the NFMA by approving the Forest Plan. The Court noted the Administrative Procedure Act governed the Court's review and that the agency's decision may only be set aside if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." When the Forest Plan was developed, the NFMA's regulations required that "national forests be managed to maintain viable populations of existing native and desired non-native vertebrate species." Plaintiffs asserted that the Forest Plan mandated a "sustainable" wolf population be maintained, not a merely viable one. The Court did not agree. The Court concluded that the "sustainability" provision of the Forest Plan was discretionary because per the terms of the Forest Plan, the Forest Service was only obligated to consider sustainability "where possible"; therefore, the Court held there was no law to apply in "second-guessing the agency". Additionally, the Court explained that it was not aware of any authority requiring an "agency to set a specific standard or benchmark for protecting the viability of a species that is not endangered or threatened". Furthermore, the Court stated that the Forest Service was not required to identify a specific method for securing viability in the Forest Plan; rather, the Forest Service "need only supply a rational connection between the facts found and the conclusions made". The Court noted the Forest Service's Record of Decision concluded that the Forest Plan would sustain viable populations of the Alexander Archipelago wolf and outlined a multi-part strategy for protecting the wolf. Therefore, the Court concluded that the Forest Service's discussion of viability was not arbitrary or capricious.

Next, the Court addressed Plaintiffs' assertions that the Big Throne Project was not consistent with the Forest Plan. The Court noted that Plaintiffs arguments stemmed from the same false premise as their objections to the Forest Plan, in that they asserted that a sustainable population is necessary. As above, the Court concluded that the sustainability provision of the Forest Plan is discretionary, and the Forest Service met its obligation to protect viability. In finding so, the Court held that the Big Thorne Project was consistent with the Forest Plan and affirmed the judgment of the District Court.

In a memorandum filed concurrently, the Court also disposed of Plaintiffs' claims brought under the National Environmental Policy Act ("NEPA").

Judge Gould dissented in part from the portion of the majority's discussion relating to the NFMA and concurred with the majority's discussion regarding NEPA. Judge Gould found the Forest Plan to provide no mechanism to ensure viability and found the Forest Service's rationale regarding viability too summary, conclusory and inadequate. Judge Gould would vacate the decision of the Forest Service and remand for further proceedings to allow the Forest Service to better explain its assessment of viability and to provide an explanation of its reasoning that is

sufficient to satisfy Motor Vehicle Mrfs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

District of Oregon

1. ***Cascadia Wildlands v. Williams*, No. 6:16–cv–00177–MC, 2017 WL 1536224 (D. Or. Apr. 27, 2017).** *Author:* Andrea Goodwin, Oregon Department of Transportation.

Cascadia Wildlands, a group of wildlife enthusiasts and advocacy organizations, brought suit arguing Defendants violated the National Environmental Policy Act ("NEPA") by failing to appropriately analyze the impact of its actions in the Environmental Assessment ("EA"). Defendants, the United States Department of Agriculture-Animal and Plant Health Inspection Service ("USDA-APHIS") Wildlife Services, and the state director of USDA-APHIS Wildlife Services, David Williams, filed a cross-motion for summary judgment. The Court denied Plaintiffs' motion and granted Defendants' motion for summary judgment in part.

The State of Oregon issued the Oregon Wolf Conservation and Management Plan (the Plan) in 2005, with an update issued in 2010. The Plan manages wolves in the geographical Eastern third of Oregon and is comprised of three phases with each phase based on the population of wolves and the number of breeding pairs in the state. Wildlife Services acts as a contractor to manage wildlife. In 2010, Oregon Department of Fish and Wildlife ("ODFW") authorized Wildlife Services to lethally remove two wolves in Oregon. Before the wolves were removed, conservation groups filed suit arguing Wildlife Services' participation, absent an analysis of the environmental effects, was a violation of NEPA. Wildlife Services agreed to stay their removal actions and conduct a NEPA analysis of its participation under Phases I and II of the Plan. Wildlife Services issued its pre-decision EA in 2012 and its Decision Notice and Finding of No Significant Impact in 2014.

The Court first addressed standing, rejecting Defendants' argument that Cascadia Wildlands lacked standing. The Court concluded Cascadia Wildlands had standing as Cascadia Wildlands adequately alleged injury-in-fact and satisfied the causation and redressability requirements.

Second, the Court addressed mootness. Defendants argued the case was moot because the Plan had moved into Phase III, and the EA, upon which the action was based, was limited to Wildlife Services' participation under Phases I and II of the Plan. The Court disagreed and found that while there was not a clear answer in either the administrative rules or the Plan as to whether the Plan could revert to a previous phase, it was possible. Therefore, the Court concluded that there is still a live and present controversy as it could not be shown to be "absolutely clear" that the allegedly wrongful behavior will not recur if the lawsuit was dismissed.

Next, the Court found that Wildlife Services' actions under the Plan did not constitute a "major federal action" under NEPA because while there was federal funding involved in implementing the Plan, Wildlife Services did not possess the requisite discretionary control over the nonfederal activity. Therefore, the Court concluded NEPA did not apply.

Finally, the Court concluded that even if NEPA did apply, Wildlife Services met its requirement under NEPA as it took a "hard look" at the impacts of its actions in the EA and provided a "convincing statement of reasons" to explain why its participation in the Plan would not significantly impact the environment.

Cascadia Wildlands has filed an appeal.

2. ***Friends of the Wild Swan, Inc. v. Thorson*, No. 3:16-cv-00681-AC, 2017 WL 2399572 (D. Or. June 1, 2017).** *Author:* Oliver Stiefel, Crag Law Center, and Mark Tuai, Lewis and Clark Law School.

Plaintiffs Friends of the Wild Swan and Alliance for the Wild Rockies ("Friends") challenged the U.S. Fish and Wildlife Service's ("FWS") Recovery Plan for the Coterminous United States Population of Bull Trout. Friends sought a declaration that FWS, in releasing the Recovery Plan, violated Section 4(f) of the Endangered Species Act, 16 U.S.C. § 1533(f), and the Administrative Procedure Act. Magistrate Judge John Acosta recommended granting of FWS's motion to dismiss for failure to state a claim for relief under either the citizen suit provision of the ESA, 16 U.S.C. § 1540(g), or the APA, 5 U.S.C. § 702. Friends objected to the magistrate's Findings and Recommendations. District of Oregon Chief Judge Michael Mosman adopted the F&R as his own opinion, offered supplemental analysis in response to Friends' objections, dismissed Friends' claims for relief under the ESA with leave to renew, and dismissed Friends APA claim with prejudice.

16 U.S.C. § 1533(f) creates a mandatory duty for the FWS to develop and implement recovery plans for listed species, unless a recovery plan will not promote the conservation of a listed species. Friends challenged the contents of the Recovery Plan, asserting it failed to comply with the requirements of Section 1533(f)(1)(B), which requires that the FWS, "to the maximum extent practicable," incorporate into the Recovery Plan: (i) site-specific management actions for the conservation and survival of the species, (ii) objective, measureable criteria for delisting, and (iii) time and cost estimates needed to achieve the plan's goals and intermediate steps. Judge Mosman agreed with Judge Acosta that while the FWS has a non-discretionary duty to incorporate the items of Section 1533(f)(1)(B), how the FWS does so is discretionary. In other words, while Plaintiffs may bring suit under the citizen suit provision when the FWS fails to incorporate one of Section 1533(f)(1)(B)'s requirements to the maximum extent practicable, the way in which the FWS does so is discretionary and thus not reviewable.

Judge Mosman held that Friends failed to state a claim under the ESA, agreeing with Judge Acosta that the alleged deficiencies of the Recovery Plan raised by Friends related only to areas within the FWS's discretion. Regarding Friends' objection that this outcome frustrates the purpose and structure of the ESA, Judge Mosman decided that Congress intended some acts of the FWS to remain outside the purview of judicial review, because the ESA citizen suit provision authorizes civil suits only for the failure to perform non-discretionary acts under Section 1533.

Friends also objected on grounds that this outcome would eviscerate the ESA's public participation requirements, but Judge Mosman pointed to the non-discretionary duties to (1)

provide public notice and opportunity for comment on draft recovery plans and (2) consider all information presented during the public comment period. In contrast, the way in which Section 1533(f)(1)(B)'s requirements are incorporated is separate and distinct from the public participation duty.

Judge Mosman also decided that the Recovery Plan did not constitute final agency action, and thus, was unreviewable under the APA. Under the two-part test set forth in Bennett v. Spear, 520 U.S. 154 (1997), for agency action to be final, the action must: (1) mark the consummation of an agency's decision making process, and (2) be one from which legal consequences flow. Judge Mosman rejected Friends' assertion that courts should focus on a recovery plan's real world consequences to determine whether it is a final agency action. Instead, he agreed with Judge Acosta that the Recovery Plan does not satisfy part two of the final agency action test because it is not legally binding; it does not determine any rights or obligations and does not require immediate compliance with its terms.

3. ***National Wildlife Federation v. National Marine Fisheries Services***, No. 3:01-cv-0640-SI, 2017 WL 1829588, (D. Or. April 3, 2017). *Author*: Cody Gregg, Willamette University Law School.

National Wildlife Federation v. National Marine Fisheries Services is the latest in a series of opinions flowing from a suit challenging the continued operation of the Federal Columbia River Power System ("FCRPS") because of its adverse impact on endangered species of salmon. Defendants, the National Marine Fisheries Services ("NMFS"), are responsible for operating dams on the Columbia and Snake rivers. Plaintiffs are non-profit environmental groups, the State of Oregon, and Native American tribes. In previous opinions, Plaintiffs prevailed on both ESA and NEPA claims. This latest opinion addresses the plaintiffs' subsequent motions for injunctive relief. Both of Plaintiffs' motions have been granted in part and denied in part.

Prior to addressing the merits of the injunctions themselves, the Court concluded that the requested injunctions were more akin to permanent injunctions, despite that they were only operative for the remand period until the NMFS complied with NEPA and the ESA. The Court also addressed the defendants' arguments that Plaintiffs' motions failed to comply with FRCP 60(b) and that Plaintiffs did not prevail on certain ESA claims because they were unaddressed in the previous order. The Court found that the motions were appropriate under 60(b)'s provision allowing modification for "other reasons" because the court had previously ordered, "Plaintiffs are free to move the Court for relief if at some future point they deem it necessary." Additionally, the Court found that its previous opinion sufficiently implied that the NMFS violated the ESA but, just in case, also held that the violations had occurred.

The injunction requested under the ESA required increased spill over certain dams to help reduce harm to juvenile fish. It also would require Defendants to begin operating juvenile bypass and related Passive Integrated Transponder ("PIT") tag detection systems earlier in the year than was previously done. The Court spent the vast majority of the opinion discussing irreparable injury and if injunctive relief was appropriate given the competing scientific evidence presented as to whether increased spill would actually help prevent juvenile fish mortality. Defendant's

contended that to qualify for injunctive relief, Plaintiffs must show that without increased spill during the remand period, the species affected were in imminent danger of becoming extinct. Disagreeing, the Court found that an earlier opinion already concluded that the status-quo spill was harming endangered salmon. It could either allow the NMFS to continue violating the ESA by maintaining the status quo, or order modifications that may prevent additional harm. The Court found the latter more appropriate. After finding that the best scientific evidence supported injunctive relief, the Court ordered increased spill. The Court declined Plaintiffs' request for a new adaptive management system to monitor spill but ordered Defendants' to implement fish monitoring on an earlier date beginning in 2018.

Under NEPA, the requested injunction would have prohibited expending any additional funds on: (1) two planned projects at Ice Harbor Dam, expected to cost approximately $37 million; and (2) any new capital improvement projects or expansion of existing projects at any of the four Lower Snake River dams that would cost more than one million dollars, in the absence of prior approval from the Court. Plaintiffs' argued that the injunction was warranted because, under NEPA implementing regulations, agencies are prohibited from committing resources to projects that could bias the outcome of the NEPA process. The Court engaged in a lengthy discussion of this theory and, finding persuasive decisions from other courts, found it consistent with Ninth Circuit decisions.

The Court, however, declined to enjoin the Ice Harbor Dam improvement projects because it found that the improvements would increase fish survival rates at that dam. Enjoining those improvements would therefore be counter to the purpose of the suit as a whole. Additionally, the court found a blanket prohibition on projects over 1mm to be inappropriate because the relief was too speculative and many improvement projects are necessary for the safe operation of the dams. Instead, the Court ordered the defendant's to provide Plaintiffs with information on all scheduled projects so that, in the event Plaintiffs disagree that the project is necessary for safety, they can move for an injunction prohibiting that specific project. The Court ordered the parties to confer on a schedule for the disclosure of project information.

4. ***Northwest Environmental Advocates v. EPA*, No. 3:12-cv-01751-AC, 2017 WL 1370713 (D. Or. Apr. 11, 2017).** *Author:* Alexa Shasteen, Marten Law.

In the latest developments in the ongoing litigation concerning Oregon's Total Maximum Daily Loads ("TMDLs"), Northwest Environmental Advocates ("NWEA") challenged the U.S. Environmental Protection Agency's ("EPA") decisions with respect to certain TMDLs the State of Oregon had submitted to the EPA for approval. Of the numerous claims addressed in the magistrate judge's findings and recommendations, the district court's order focused on only a few, primarily those relating to the Endangered Species Act ("ESA").

Two of NWEA's claims alleged that the EPA violated the ESA by failing to consult with the U.S. Fish and Wildlife Service or the National Oceanic and Atmospheric Administration's Fisheries Services (collectively, the Services), complete biological assessments, or make a "no-effects" finding before approving several temperature TMDLs.

The ESA requires federal agencies to formally consult with the Services if a proposed agency "action may affect listed species or critical habitat." 50 C.F.R. § 402.14(a). Formal consultation is not required when the proposed action will have "no effect" on the listed species. In order to constitute an action triggering consultation, an "agency action" must be an action (1) "authorized, funded, or carried out by [a federal] agency"; and (2) that "the agency ha[s] some discretion to influence or change…for the benefit of a protected species."

The district court concluded that "[t]he EPA's decision approving a TMDL is an affirmative action triggering ESA § 7 consultation requirements" because "EPA's approval of the TMDLs changed the water quality standards," resulting in "binding legal effects" that "affect[] the entire CWA [Clean Water Act] enforcement regime." Additionally, the court ruled "that the EPA had some discretion to influence or change the activity for the benefit of a protected species" because it had the authority to disapprove of the TMDLs because they did not meet water quality standards. Accordingly, the two requirements to trigger ESA consultation were met. Consultation was not excused due to a no-effect finding because, while it was "undisputed that the EPA made a 'no-effect' finding for the Willamette Basin TMDL," it "failed to engage in the same analysis in the subsequent TMDLs," and therefore the court was unable to determine whether a no-effect finding was in fact justified.

After determining that consultation was required, the court proceeded to explain that EPA had not "fulfilled the consultation requirement by consulting on Oregon's 2004 water quality standards" upon which the TMDLs were based. The district court disagreed with the magistrate judge's conclusion that "[a]gency approvals of actions that were contemplated in the prior approval of an action subject to an ESA consultation are subsumed within the prior consultation." Further, the biological opinions from the prior consultation had previously been vacated, so they could not possibly have satisfied the need for consultation on the TMDLs.

In addition to these ESA rulings, the district court granted EPA's request to voluntarily remand the Klamath basin temperature TMDL and the Willamette Basin mercury TMDL, and imposed a two-year timeline for remand.