ENR CASE NOTES

Recent Environmental Cases and Rules

Environmental and Natural Resources Section OREGON STATE BAR
Editor: Matthew Preusch October 2013

Editor's Note: This issue contains selected summaries of cases issued in August, September and October of 2013. Please contact me if you have any comments or suggestions about the newsletter, or if you would like to recommend a case or rule for inclusion in future issues. Thank you to Willamette Law Online and to all authors who volunteered for this and future newsletters. If you are interested in summarizing cases and rules, please contact me.

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Casondra Albrecht, Willamette Law Online
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While the failure to regulate greenhouse gas emissions in compliance with the Clean Air Act may create an injury in fact to meet the first test for standing, the causation and redressability

prongs of the test cannot be met because a multitude of other factors may cause the injuries and cannot be appropriately redressed by the courts.

Two non-profit conservation groups, Washington Environmental Council and the Washington State Chapter of the Sierra Club ("Plaintiffs"), brought a citizen suit under the Clean Air Act to compel the Washington State Department of Ecology and other regional agencies (the "Agencies") to regulated emissions from oil refineries in the state. The Western States Petroleum Association ("WSPA") intervened on behalf of the Agencies. The complaint alleged the agencies were in violation of two provisions of the Clean Air Act State Implementation Plan. The district court granted summary judgment to the Agencies on one claim, but enjoined the Agencies to complete the process of defining and enforcing the "reasonably available control technology" standard for greenhouse gases. WSPA appealed, arguing the Plaintiffs lacked standing.

The Ninth Circuit reviewed the Plaintiffs' claims for a concrete, particularized injury in fact that is actual or imminent, fairly traceable to the challenged conduct, and is likely to be redressed favorably by the courts. The panel found the affidavits submitted by Sierra Club members detailing the harms suffered as a result of the greenhouse gases sufficient to state an injury in fact. However, the panel held because the misconduct by the Agencies is not "fairly traceable" to the injury, the causation prong is too attenuated to satisfy the test. Acknowledging the difficulty in establishing causation in cases involving greenhouse cases, the panel found such pollutants combine with too many other factors to make a conclusive causation determination. Similarly, the panel held the redressability prong is not satisfied because no evidence demonstrated that enforcing the standards will curb a significant amount of the emissions, or reduce the pollution causing the injuries.

Wild Fish Conservancy v. Jewell, No. 10-35303, ___ F.3d ___ (9th Cir. Sep 11, 2013), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2013/09/11/10-35303.pdf
Samuel Rayburn, Willamette Law Online
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The Wild Fish Conservancy ("Conservancy") brought an action under the Administrative Procedures Act challenging "the United States' diversion of water from Icicle Creek." The Conservancy alleged that water was being illegally diverted from Icicle Creek in violation of Washington state law. The Conservancy claimed that the hatchery currently receiving the diverted water "is subject to section 8 of the Reclamation Act of 1902, which requires that federal reclamation projects operate in compliance with state water law." The district court held that the Conservancy's claims were untimely and granted the government's motion for summary judgment.

On appeal, the Conservancy raised the following: (1) the United States was improperly diverting water and violating Washington state law; and (2) by not submitting fishway plans for approval and by failing to provide "a durable and efficient fishway," the United States was violating Washington's fishway law. On the first claim, the Ninth Circuit held that the Conservancy lacked prudential standing because the language of section 8 "makes clear that

Congress did not intend to permit private parties who lack water rights a private right of action to compel enforcement of state law against federal agencies." On the second claim, the Ninth Circuit dismissed the Conservancy's arguments, finding that "the relevant provisions of the fishway law [were] not incorporated into section 8 of the Reclamation Act," and alternatively, that the Conservancy's claim did not challenge a final agency action.

United States v. Humphries, No. 11-50383, ___ F.3d ___ (9th Cir. Aug 29, 2013), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2013/08/29/11-50383.pdf
Jason Spears, Willamette Law Online
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Harry Humphries co-owned a chemical company that stored used chemicals in a rented building. Years after the building owner sold the building and the chemicals were removed, Humphries was charged with knowingly storing hazardous waste in violation of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928. At trial, Humphries claimed that he was not storing the chemicals because he "had decided to have them removed." The jury instructions defined the "storage" of hazardous waste under 42 U.S.C. § 6903(33) as "the containment of hazardous waste…in such a manner as not to constitute disposal of such hazardous waste." The jury asked whether "disposal" begins "with the act of disposal or with the decision to dispose." The court answered that "disposal begins with the act of disposal…." The jury convicted Humphries, and he appealed.

Humphries claimed that the district court incorrectly answered the jury's question because he believed he could not be convicted of storing the waste since he had decided to dispose of it. The Ninth Circuit noted that under § 6903(3) and (33), disposal refers to an act. The statute did not support Humphries' interpretation, which would allow someone to claim he was not "storing" waste simply because he was "intending" to dispose of it. Humphries also claimed that the answer to the jury's question directed it to "an adverse finding as to the storage element" and that he could not have "knowingly" stored the waste since he was trying to remove it. The district court's response to the jury's question only reflected that Humphries had not "disposed of" the waste as defined by the statute. Therefore, the court's answer had not prevented the jury from finding that Humphries lacked the required mental state, and the jury instruction was not an abuse of discretion.

Montana Wilderness Association v. Connell, No. 11-35818, ___ F.3d ___ (9th Cir. Jul 31, 2013), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2013/07/31/11-35818.pdf
Jason Juran, Willamette Law Online
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Several environmental groups brought an action in district court challenging the Bureau of Land Management's ("BLM") Resource Management Plan ("RMP") for the Upper Missouri River Breaks National Monument ("Monument"). The groups claimed that the RMP, which

authorized roads, airstrips and motorboats in the Monument, violated the Federal Land Policy and Management Act ("FLPMA"), the National Environmental Policy Act ("NEPA"), and the National Historic Preservation Act ("NHPA"). The district court granted summary judgment in favor of the defendants on all three claims.

On appeal, the Ninth Circuit affirmed the summary judgment on the FLPMA and NEPA claims, finding neither arbitrary or capricious decision-making nor evidence that the mapping and designation methods of the RMP were fundamentally different from existing methods. Because the record reflected that the RMP ways were designated as open and were mapped before the Monument RMP, the panel did not find evidence that the RMP would violate the nonimpairment mandate or would degrade wilderness values. Further, the panel did not believe that BLM's off-road travel ban violated the FLPMA because it did not abuse its discretion when creating its definition of "roads." The panel vacated the summary judgment regarding the NHPA claim, finding that the BLM was not conducting its required Class III surveys with respect to roads, airstrips and motorboats. On remand, instructions were given to enter judgment for the environmental groups on the NHPA claim and to enter an order requiring the BLM to conduct the required Class III surveys.

Alaska Wilderness League v. U.S. E.P.A., 727 F.3d 934 (9th Cir. 2013), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2013/08/15/12-71506.pdf
Bradley Thayer, Willamette Law Online
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In 2011, Shell Offshore, Inc. ("Shell") secured a permit to comply with Title V of the Clean Air Act ("the Act"). The permit allowed Shell to operate "pollutant emitting activities" with the drilling vessel called the *Kulluk* in the Beaufort Sea off Alaska's North Slope. Before awarding Shell the permit, the Environmental Protection Agency ("EPA") released a Statement of Basis, which established that the EPA would not require Shell "to analyze the effect its emissions would have on the increment for the *Kulluk*'s area of operation." The EPA explained this controversial decision by concluding that, with respect to increment analysis under § 7661c(e) of the Act, no increment requirements applied to the *Kulluk*. The EPA's permit also granted Shell an exemption of 500 meters surrounding the *Kulluk* from "ambient air" regulation. The Alaska Wilderness League ("AWL") challenged the permit on multiple grounds before the EPA Environmental Appeals Board ("EAB"). The EAB rejected the AWL's challenges, and AWL timely petitioned for review of the EAB decision.

The Ninth Circuit first analyzed whether the EAB should be awarded deference under *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.* Finding that § 7661c(e) of the Act is ambiguous as to whether "increment" requirements are "applicable" to a temporary source, in this case, the *Kulluk*, the panel deferred to the EAB's reasonable interpretation of § 7661c(e), which did not require a preconstruction increment analysis. The panel then denied AWL's petition for review of the 500-meter "ambient air" regulation exemption that the EPA granted to Shell because the EPA decision was "a permissible application of the EPA's regulations."

Natural Resources Defense Council v. County of Los Angeles, 725 F.3d 1194 (9th Cir. 2013), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2013/08/08/10-56017.pdf
Rebecca Voss, Willamette Law Online
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Natural Resources Defense Council ("NRDC") and Santa Monica Baykeeper filed suit alleging the County of Los Angeles and Los Angeles County Flood Control District were in violation of the National Pollution Discharge Elimination System ("NPDES") by discharging polluted storm water. The district court granted summary judgment for the defendants reasoning that the Plaintiffs' evidence failed to prove any individual defendant had discharged in violation of the Clean Water Act because Plaintiffs took samples from downstream rather than at relevant discharge points. On appeal, the Ninth Circuit affirmed in part and reversed in part the district court decision. The Supreme Court then reversed and remanded the case back to the Ninth Circuit. On remand, the panel held that the pollution exceedances detected at the Defendants' stations were sufficient to establish liability for the NPDES permit violation as a matter of law. The panel reasoned that because the Plaintiffs' monitoring data showed pollutants exceeding that allowed in federally protected navigable bodies of water, this conclusively demonstrated that Defendants were not in compliance with the permit and as such were liable for damages. The panel further held that the monitoring requirements listed in the Clean Water Act support their decision. The panel remanded for further proceedings, including a determination of the appropriate remedy.

State of Alaska v. Lubchenco, 723 F.3d 1043 (9th Cir. 2013), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2013/07/23/12-35201.pdf
Jason Juran, Willamette Law Online
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Fishing industry representatives and the State of Alaska challenged a district court ruling allowing limitations on the commercial fishing industry put in place for particular sub-regions of the Pacific Ocean by the National Marine Fisheries Services ("NMFS"). These sub-regions are inhabited by the endangered western Distinct Population Segment of Stellar sea lions ("Western Sea Lions"). Western Sea Lions were declared endangered in 1997. Two of the seven sub-regions they inhabit have been experiencing population declines attributed to nutritional stress. Fishing industry representatives and the State of Alaska contend that the NMFS violated the Endangered Species Act (hereinafter "ESA") by basing the fishing restrictions on declines in sub-regions rather than on the entire population of the species. They also contend that the NMFS utilized the wrong standards in measuring the effects of continued fishing and failed to find a sufficient causal link between authorizing fisheries and the population decline. The Ninth Circuit reviewed the agency actions narrowly, stating that they must only determine if the agency's action was arbitrary or capricious. The court has consistently held that the ESA permits agencies to consider the impact of actions on sub-populations, as long as such impact would affect the population as a whole. Additionally, the panel noted that the NMFS stopped using the regulatory

definition of adverse habitat modification after the 2004 opinion in *Gifford Pinchot Task Force*. The panel acknowledged that there is no reason to require the agency to go back to the regulation that was deemed questionable in their prior ruling, and that following the statutory provision of the ESA is acceptable.

California Sportfishing v. Chico Scrap Metal, 728 F.3d 868 (9th Cir. 2013), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2013/07/22/11-16959.pdf
Gabrielle Hansen, Willamette Law Online
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Sportfishing Protection Alliance ("the Alliance"), brought suit against Chico Scrap Metal ("Chico"), alleging they violated a National Pollutant Discharge Elimination System ("NPDES") permit issued pursuant to the Clean Water Act ("the Act"). This appeal came after the district court ruled that 33 U.S.C. § 1365(b)(1)(B), barred the claim. On appeal, defendants argued that 33 U.S.C. § 1319(g)(6)(A)(ii) was also a bar. Section 1365(b)(1)(B) bars action, "if [a state or federal authority] has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State *to require compliance with the standard*, limitation, or order…." Chico argued that an action is barred if the government action is comparable to the one brought under the Act. The word comparable is not used in § 1365(b)(1)(B). The Ninth Circuit held that this bar only applies if the government's action seeks to "require compliance" with the standard, limitation, or order that is the subject of a citizen suit. The records showed that California had never sought judicial enforcement of the permit and the prior proceedings were judicial enforcement of laws other than the Clean Water Act. The panel held that § 1365(b)(1)(B) was not an applicable bar. Section 1319(g)(6)(A)(ii), states that, "any violation…with respect to which a State has commenced an diligently prosecuting an action under a State law comparable to this subjection… shall not be the subject of a civil penalty action by a citizen." Chico argued that because they had been prosecuted under California statutes, which contain penalties, and because they are liable for administrative penalties under a consent order, § 1319(g)(6)(A)(ii) is a bar. However, because the state's actions in court were not administrative penalties comparable to those under the Act, § 1319(g)(6)(A)(ii) was not a bar.

Klamath Siskiyou Wildlands Center v. Gerritsma, No. 1:12-CV-1166-PA, __ F. Supp. 2d __, 2013 WL 4477834 (D. Or. Aug. 21, 2013).
Liv Brumfield, *Advocates for the West*

Plaintiffs Klamath Siskiyou Wildlands Center, et al., challenged a U.S. Bureau of Land Management ("BLM") decision approving a logging project in southwestern Oregon, claiming that it violated the National Environmental Policy Act ("NEPA") and the Federal Land and Policy Management Act ("FLPMA"). BLM completed an Environmental Assessment ("EA") for the project, which would allow logging on 857 acres, construction and decommissioning of roads, and removal of trees infected with mistletoe on ten acres. Much of the project area included land subject to the Oregon & California Lands Act or "matrix" land under the

Northwest Forest Plan. The court reviewed BLM's decision under the Administrative Procedure Act and ultimately dismissed the action.

Plaintiffs brought two claims under NEPA and one under FLPMA. First, Plaintiffs contended that, to understand the effects of the planned mistletoe removal activities, NEPA required BLM to state how many mistletoe-infected trees would be removed under the project. The court disagreed, finding that (1) BLM limited the area where mistletoe-infected trees would be logged and that (2) the agency would remove trees based on a rating system described in the EA, concluding that Plaintiffs had not shown why NEPA required more. Second, Plaintiffs contended that NEPA required BLM to seek more information on the effects of unauthorized off-highway vehicle use on project roads. Again, the court disagreed, deferring to BLM's conclusion that the project was "reasonably designed to minimize such use." Third, Plaintiffs argued that project road building and logging failed to comply with soil protection requirements in the governing Resource Management Plan ("RMP"), in violation of FLPMA. The court again found for BLM, noting the agency's discretion in deciding how to achieve RMP compliance, and deferring to the agency's conclusion that a 15% reduction in soil productivity was allowable under the RMP as long as the project included practices to reduce and mitigate such losses.

***Oregon Natural Desert Association v. Jewell*,** No. 3:12-CV-00596, __ F. Supp. 2d __, 2013 WL 5101338 (D. Or. Sep. 11, 2013).
Adrienne Thompson, Judicial Clerk to the Hon. Jack L. Landau

Plaintiffs, the Oregon Natural Desert Association and the Audubon Society of Portland (collectively, "ONDA") sued the U.S. Bureau of Land Management and Secretary of the Interior ("BLM") alleging that BLM did not adequately comply with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.* when the agency granted a right-of-way for the North Steens 230-kv Transmission Line associated with the Echanis Wind Energy Project in eastern Oregon. ONDA argues that the agency's Final Environmental Impact Statement ("FEIS") and Record of Decision ("ROD") should be overturned on account of, among other things, BLM's failure to consider and mitigate the project's impact on sage-grouse and golden eagle populations.

The Echanis Wind Energy Project is a 104MW wind farm being developed on the north side of Steens Mountain in southeastern Oregon. The project developer, Columbia Energy Partners, LLC, ("CEP") signed a longer-term power purchase agreement to deliver the project's power output to Southern California Edison customers. To bring this power to market, however, will require a 44-mile, 230-kV transmission line, 12 miles of which would run through BLM-administered land. CEP applied for this 12-mile right-of-way back in 2008, initiating a multi-year NEPA analysis that concluded with the agency's favorable FEIS and ultimately prompting ONDA to bring the present litigation in the U.S. District Court of Oregon.

ONDA's concerns revolve around the important and high-quality sage-grouse and golden eagle habitats in and around Steens Mountain that could be threatened by the Echanis project and the associated new transmission line. ONDA challenged BLM's FEIS and ROD under the Administrative Procedure Act, 5 U.S.C. §§ 701-708. CEP and Harney County intervened in support of BLM. All parties moved for summary judgment.

ONDA claimed that:

- BLM failed to consider the impact of the project on fragmentation and connectivity of sage-grouse habitat;
- BLM failed to follow its own policies relating to sage-grouse and golden eagles;
- The FEIS contained inadequate information about the impacts of the project on sage-grouse and golden eagles;
- BLM failed to consider and respond to other agencies' critical comments;
- BLM failed to specify required mitigation measures and relied on the assumption that Harney County would require mitigation for the impacts to private land;
- BLM failed to analyze the effectiveness of the proposed mitigation measures; and that
- BLM failed to allow public comment on the wholesale changes it made between the Draft and Final EIS.

The court denied ONDA's motion for summary judgment, rejecting the organization's arguments on each of the seven issues raised by the plaintiffs.

On the first issue, the court found that BLM adequately considered the project's impacts on fragmentation and connectivity. On the second issue, the court found that BLM did not act arbitrarily and capriciously in following its own policies. On the third and fourth issues, the court found that BLM's surveys and data were adequate, and that the agency sufficiently considered and responded to other agency comments. The court also found that BLM was not required to specify mitigation obligations for the project developer, but instead, was permitted to rely on Harney County's imposed mitigation measures--measures that BLM sufficiently assessed, according to the court. Lastly, the court found that BLM was not required to solicit public comment on its FEIS.

As a result, the court found that BLM's decision to issue its FEIS and ROD was not arbitrary and capricious, and granted the motions for summary judgment raised by BLM, CEP, and Harney County.