

ENR Case Notes, Vol. 17

Recent Environmental Cases and Rules

Environmental and Natural Resources Section
Matthew Preusch, Editor

Oregon State Bar
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Editor's Note: This issue contains selected summaries of cases and rules issued in January, February, and March of 2014.¹ 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 the authors who contributed to this newsletter: Nathan Baker, Lawson Fite, Bob O'Halloran. If you are interested in summarizing cases and rules, please contact me.

Matthew Preusch
Case Notes Editor
mpreusch@gmail.com
Oregon Department of Justice
matthew.j.preusch@doj.state.or.us

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¹ A summary of the Oregon Court of Appeal's decision in *Barkers Five, LLC v. LCDC* will appear in Case Notes Vol. 18.

CASES

9th Circuit Court of Appeals

Native Village of Point Hope v. Jewell, No. 12-35287, ___ F.3d ___ (9th Cir. Jan. 22, 2014), available at <http://cdn.ca9.uscourts.gov/datastore/opinions/2014/01/24/12-35287%20web%20corrected%202.pdf>

Gabrielle Hansen, Willamette Law Online

Summary reprinted with permission of and first published by Willamette Law Online at <http://willamette.edu/wucl/resources/journals/wlo/9thcir/2014/01/native-village-of-point-hope-v.-jewell-.html>

Pursuant to leasing an area in the Chukchi Sea for oil and gas production, the Bureau of Ocean Energy Management (“BOEM”) prepared a Final Environmental Impact Statement (“FEIS”) to analyze the environmental effects of the proposed leases. Based on the FEIS and a supplemental EIS (“SEIS”), the district court granted summary judgment for the defendants in favor of the lease. On appeal, the plaintiffs argued that the agency’s estimate of one billion barrels was arbitrary and the FEIS and SEIS lacked critical information. The BOEM contended that much of the missing information was related to how animal populations would be affected in the event of a spill, but that since the agency concluded the effect on the animals would be almost identical under each alternative drilling scheme, the agency did not determine it necessary information to make a choice between the alternatives.

The Ninth Circuit agreed, reasoning that the level of analysis in an EIS is different at each stage of development of the project, and that circumstances are relevant in determining the level of information required. In addition, the panel agreed with the BOEM that compliance with other statutes would ensure the protection of the species in question. However, the panel concluded that the barrel estimate was arbitrary. The BOEM had not fully given the rationale for the use of the lowest possible amount of oil that was economical to produce as the base for its analysis, the BOEM did not take into account fluctuation in oil prices in their conclusion that one billion barrels would be economically recoverable. In addition, the BOEM based its EIS solely on the first field of the leased area without explanation.

San Luis v. Jewell, No. 11-15871, ___ F.3d ___ (9th Cir. Mar. 3, 2014), available at <http://cdn.ca9.uscourts.gov/datastore/opinions/2014/03/13/11-15871%20web%20revised.pdf>

Giovanne Vernacchia, Willamette Law Online

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The Central Valley Project and the State Water Project (“the Projects”) supply water to “agricultural and domestic consumers in central and southern California.” The water’s source is the sole habitat for the delta smelt, a threatened species. The U.S. Fish and Wildlife Service’s (“FWS”) 2008 biological opinion (“BiOp”) found that the Projects would threaten the delta smelt, and it proposed reasonable alternatives. Agricultural consumers, water districts, and water consumers (collectively, “Plaintiffs”), sued various federal defendants under the Administrative Procedure Act to prevent them from implementing the BiOp. The district court found that the BiOp was arbitrary and capricious; Plaintiffs appealed.

The Ninth Circuit first held that the district court erroneously admitted certain expert testimony. Next, the panel held that the BiOp was not arbitrary and capricious because: (1) using raw numbers to set river flow limits was supported by substantial evidence; (2) the BiOp reasonably relied on certain models when evaluating the impact on the location in the estuary considered the smelt's spawning habitat; (3) the incidental take statement included adequate support; and (4) the record supported the BiOp's conclusions about the Projects' indirect effects. The panel disagreed with the district court and held that FWS was not required to explain how its reasonable alternatives satisfied the non-jeopardy factors in 50 C.F.R. § 402.02. The panel also affirmed all National Environmental Policy Act claims, as well as the district court's remand for the Bureau of Reclamation to "complete an Environmental Impact Statement evaluating the effects of its adoption and implementation of the BiOp."

District of Oregon

Native Fish Soc'y v. Nat'l Marine Fisheries Serv., ___ F. Supp. 2d. ___, 2014 WL 199093 (D. Or. Jan 16, 2014).

Nathan Baker, Staff Attorney, Friends of the Columbia Gorge

In this case, the Oregon District Court held that the National Marine Fisheries Service ("NMFS") violated the Endangered Species Act ("ESA"), the National Environmental Policy Act ("NEPA"), and the Administrative Procedure Act in approving hatchery genetic management plans ("HGMPs") for a fish hatchery operated by the Oregon Department of Fish and Wildlife on the Sandy River.

The court first held that NMFS had violated NEPA by failing to prepare an environmental impact statement ("EIS"). The court focused on the potential harm caused by the straying of hatchery fish into wild spawning areas. NMFS argued that the adverse impacts of the hatchery on wild salmon are minor within the historical context of past hatchery operations. The court rejected this argument, noting that the agency had failed to even discuss or analyze this issue in its NEPA decision, and also questioning whether previous greater environmental damage makes the current damage any less significant. Of particular importance for the court was the uncertainty associated with the hatchery; the agency itself conceded that it did not know whether its targets for preventing the straying of hatchery fish would actually be met.

The court next held that NMFS violated NEPA by failing to analyze a reasonable range of alternatives. The agency had evaluated only a preferred alternative and a "no action" alternative, and had rejected five additional alternatives without analysis. The court noted that even on a numeric basis alone, there seemed to be a broad range of potential alternatives; the hatchery apparently could release anywhere between zero and one million smolts, and it was not clear to the court "why it would not be meaningful to analyze a number somewhere in the middle or why such a number would preclude the provision of fishing opportunities."

The court also held that there was significant uncertainty regarding the HGMPs' potential efficacy in achieving the agency's goals, particularly regarding the efficacy of proposed mitigation measures. Failure to attain these goals would in fact harm listed species. Given the

uncertainty regarding mitigation, the agency violated NEPA by failing to evaluate the potential harm in an EIS.

In addition to the NEPA violations, the court concluded that NMFS had violated the ESA on several grounds. First, the agency had failed to consider important aspects of the problem by failing to adequately analyze historical stray rates, the problems posed by stray rates, why the agency reached the optimistic conclusion that the hatchery's "terrible track record" on stray rates was expected to dramatically improve, and whether the hatchery would in fact be using "local fish" for its broodstock. Second, the court reiterated its prior conclusions that NMFS had inappropriately relied on mitigation measures that were not reasonably certain to occur, and concluded that this error not only violated NEPA, it also violated the ESA. Next, the court held that NMFS's use of a three-year average for target stray rates was unlawful, in part because there was no binding commitment by the agency to take immediate action if it became apparent in the first or second year that the average target was not likely to be met. Finally, the court held that NMFS had failed to provide any explanation of the targets it chose for percentage changes in various straying factors from one year to the next.

AGENCY ACTIONS

DSL Limits Placer Mining Permitting in Oregon's Salmon and Bull Trout Habitats

Notice of the Department of State Lands' (DSL) changes to OAR 141-089-0640, 141-089-0645, 141-089-0820, 141-089-0825, 141-089-0830, and 141-089-0835, 53 Or. Bull. 106 (January 1, 2014).

Bob O'Halloran, Judicial Clerk to Judge Stephen K Bushong; robert.l.ohalloran@ojd.state.or.us.

On January 1, 2014, Oregon's Department of State Lands ("DSL") adopted new final rules on motorized suction dredge mining to conform existing regulations to enrolled SB 838 (2013). Consistent with that authorizing legislation, DSL's amended rules place a moratorium until 2021 on mining with motorized equipment in Oregon's salmon and bull trout habitat waterways not otherwise permitted under ORS 517.702 through 517.989. Further, the moratorium applies not only to salmon and bull trout habitat waterways, but to the adjacent 100 feet perpendicular to each waterway's high water mark.

However, as directed by SB 838, the new final rules do allow continued, if limited, motorized suction dredge mining between January 1, 2014 and January 2, 2016 through DSL's placer mining and general authorization permitting under ORS 196.810 and ORS 196.850, respectively. Under those permitting schemes, in addition to requirements already in place, for those waterways subject to the moratorium DSL (1) cannot issue more than 850 mining permits at any one time, and (2) must only issue permits to miners at least 500 feet from one another, unless the Department of Environmental Quality determines that another distance is appropriate to protect water quality. Additionally, after getting a permit, permitted placer miners may not leave their motorized equipment unattended in the wetted perimeter of any Oregon water, and may only mine between 9 a.m. and 5 p.m. A miner faces a Class A violation otherwise.

Aside from the permit cap, the new rules do not change the permit application process, though the new rules do explain how DSL will issue permits before and after it reaches the 850-

permit cap. When DSL receives more than 850 notifications before February 28 of a given year, DSL gives priority to older permits, but not beyond 2006. If DSL receives fewer than 850 notifications in that same time frame, DSL issues permits on a first come, first served basis. To be timely, a person seeking a permit for a given year must file their notification with DSL between January 1 and February 28 of that year.

Additional information is available from the Oregon Bulletin online:
http://arcweb.sos.state.or.us/pages/rules/bulletin/0114_bulletin/0114_ch141_bulletin.html.

U.S. FWS Proposes De-Listing of Oregon Chub

Proposed Rule: Removing the Oregon Chub from the List of Endangered and Threatened Wildlife (U.S. Fish and Wildlife Service, 79 Fed. Reg. 7136 (Feb. 6, 2014))
Lawson Fite, Markowitz Herbold Glade & Mehlhaf PC

Although the recent de-listing of the bald eagle gained more media attention, the U.S. Fish and Wildlife Service (Service) has declared a local species, the Oregon chub, to be recovered and has proposed its removal from the federal endangered species list. The Oregon chub is a minnow-like fish that lives in backwaters, beaver ponds, and other calm-water off-channel habitats throughout the Willamette and Santiam River basins. When it was listed as an endangered species in 1993, the chub had dwindled to only nine known populations that lived in 2 percent of its former habitat throughout the Willamette Valley. The chief threats to the species have been the reduction in off-channel habitat resulting from impoundments (dams) and predation by non-native fish.

The Service now believes that the chub has recovered; that is, it is neither an endangered species (defined as a species currently in danger of extinction) nor a threatened species (a species likely to become endangered in the foreseeable future). For definitions, see 16 U.S.C. §§ 1532(6), (20). In performing its recovery analysis, the Service went through the same five listing factors in Section 4(a)(1) of the Endangered Species Act, 16 U.S.C. § 1533(a)(1), that it considers when deciding whether to put a species on the list.

The Service based its conclusion that the chub has recovered on population figures that show the chub is present in at least 79 locations, with a total species population over 220,000 individuals. These figures meet the principal goals established in the Service's recovery plan: (1) at least 20 populations of at least 500 fish; (2) stable or increasing trends in all the large populations; and (3) presence of at least four large, stable populations in each sub-basin of the Willamette/Santiam watershed.

How did a species go from the brink of extinction to full recovery in 21 years? No one factor predominates, of course. First, the Service says, is that many new populations were discovered in less-sheltered river areas. So the situation was not as bad as first feared. Second, the Service, working cooperatively with the Oregon Department of Fish and Wildlife, and private landowners who agreed to carry out land management measures, introduced 20 new populations of the fish. Many of these introduced populations are in isolated waters less susceptible to non-native fish intrusion. Third, modifications to dam operations in the Willamette Basin, largely to benefit other listed species, have restored consistent flows and habitat for the chub. The chub's quick recovery is a true success story of federal, state, and

private collaboration. But the listing is not the end of federal involvement; the Service intends to monitor the species' population and applicable management measures for at least the next nine years.

The chub is also the subject of a legal footnote. Shortly after the chub was listed in 1993, Congress imposed a moratorium on designation of critical habitat under the Endangered Species Act. Critical habitat is normally designated as soon as possible after a species is listed. 16 U.S.C. § 1533(b)(3)(A). Fourteen years later, a suit was filed in Federal District Court seeking to compel designation of critical habitat. The Service, represented by the undersigned (in his first oral argument), moved to dismiss on statute of limitations grounds, citing an Eleventh Circuit case that found a similar suit to be time-barred. *See Center for Biological Diversity v. Hamilton*, 453 F.3d 1331 (11th Cir. 2006). While Judge Papak recommended that the case be dismissed, Judge Brown disagreed. *Inst. for Wildlife Prot. v. U.S. Fish & Wildlife Serv.*, No. 07-cv-358-PK, 2007 WL 4118136 (D. Or. July 25, 2007), *modified by* 2007 WL 4117978 (D. Or. Nov. 16, 2007). The case settled and the Service designated critical habitat in 2009. If the proposed de-listing is finalized, the critical habitat will be vacated.