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Recent Environmental Cases and Rules

Environmental and Natural Resources Section — Oregon State Bar
Matthew Preusch, Editor — January 2015

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- ***San Luis v. Locke***, No. 12-15144, ___ F.3d ___ (9th Cir. Dec. 22, 2014)
- ***Conservation Congress v. Finley***, No. 12-16916, ___ F.3d ___ (9th Cir. Dec. 16, 2014)
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- ***Alliance for the Wild Rockies v. USDA***, No. 13-35352, ___ F.3d ___ (9th Cir. Nov. 20, 2014)
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- ***Landwatch v. Connaughton***, No. 6:13-CV-02027-AA (D. Or. Dec. 5, 2014)

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- ***Waterwatch of Oregon, Inc. v. Water Resources Dept.***, Nos. A148870, A148872, A148874, ___ Or. App. ___ (Dec. 31, 2014)

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- *Oregon Department of State Lands,* ***Order Denying State of Wyoming's Request for Rehearing*** (Oct. 1, 2014)

9th Circuit Court of Appeals

San Luis v. Locke, No. 12-15144, ___ F.3d ___ (9th Cir. Dec. 22, 2014), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2014/12/22/12-15144.pdf
Rianna Venn, Willamette Law Online

California's Central Valley is naturally an "arid or semi-arid" area. To help the Central Valley sustain the agriculture that is demanded, "the federal and state governments have invested enormous sums of money developing infrastructure to pump water out of the rivers that crisscross the Valley's floor . . . [for] agricultural and domestic consumers in California. However, extracting water alters "the rivers' natural state and threaten[s] the viability of the species that depend on them."

The Department of Interior's Bureau of Reclamation ("Reclamation") had the Commerce Department's National Marine Fisheries Service ("NMFS") evaluate "the impact of continuing water extraction in the Central Valley." In that Biological Opinion ("BiOp"), NMFS "determined that Reclamation's proposed project would jeopardize some of the Delta's endangered Salmonids," and therefore suggested "to change the way it pumps water out of the Valley's rivers." Several environmental and fishing groups sued several water authorities to stop that change.

The district court granted summary judgment to the after determining "that NMFS had violated the Administrative Procedure Act's ("APA") arbitrary or capricious standard when developing much of the BiOp." On appeal, the Ninth Circuit reviewed the BiOp under the APA standard, which "requires a reviewing court to uphold agency action unless it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" Appling that standard, the panel upheld the BiOp "in its entirety" because "NMFS relied on the factors that Congress intended it to consider, considered all important aspects of the problem, and offered explanations for its decisions that are in line with the evidence." The panel also found that the district court "engaged in an in-depth substantive review of the science supporting the BiOp," which did not provide the proper APA deference to NMFS.

Conservation Congress v. Finley, No. 12-16916, ___ F.3d ___ (9th Cir. Dec. 16, 2014), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2014/12/16/12-16916.pdf
Sydney Safley, Willamette Law Online

The Conservation Congress claimed that the U.S. Forest Service and U.S. Fish & Wildlife Services ("Agencies") failed to conduct an adequate consultation for the Beaverslide Project according to 50 C.F.R. § 402.16 ("Reinitiation of Formal Consultation" within the Endangered Species Act) and 16 U.S.C. § 1536(a)(2) ("Interagency Cooperation" of the Endangered Species chapter). The Beaverslide Project's stated purpose is to lower the risk of forest fires and create a long-term timber supply in California. The Conservation Congress claims the project is threatening the population of an endangered species, the Northern Spotted Owl.

The Ninth Circuit explained that, under the Endangered Species Act, 16 U.S.C. § 1531

(“ESA”), if a project may affect an endangered species, the acting agency must initiate a formal or informal consultation to more accurately determine the effects of the project on the species. If a formal or informal consultation is conducted, then it must be reinitiated if later information reveals potential effects that were not previously considered. However, not every modification requires a reinitiating consultation.

The Conservation Congress argued that the government did not use the “best scientific data” in accordance with 16 U.S.C. § 1536(a)(2). The Ninth Circuit found that reviewing courts must be very deferential in determining whether agencies supported their conclusions with accurate and reliable data and considered all relevant data. Also, the Agencies contended that the Conservation Congress’s notice of intent to sue did not provide sufficient information. The panel ruled that a notice of intent to sue need not be specific about legal arguments, but must put agencies on notice of perceived violations in accordance with the purposes of the ESA. Finally, whether the district court properly granted summary judgment depends on the “rule of reason,” which considers if the Environmental Impact Statement contains a thorough discussion of the potential affects. In other words, the agency must take a “hard look” at the significant environmental aspects. The district court found that the Agencies did in this case, and the Ninth Circuit affirmed.

WildEarth Guardians v. McCarthy, No. 12-16797, ___ F.3d ___ (9th Cir. Dec. 1, 2014), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2014/12/01/12-16797.pdf
Jacalyn Boyle, Willamette Law Online

WildEarth Guardians, Midwest Environmental Defense Center, and Sierra Club (collectively “plaintiffs”) brought suit against the Environmental Protection Agency (“EPA”) in an attempt to force the EPA Administrator to revise administrative rules regarding ozone pollution. The Clean Air Act includes a citizen-suit provision, which allows suits against the EPA Administrator for non-discretionary actions. Plaintiffs alleged that issuing regulations is a non-discretionary duty.

The district court dismissed the suit for lack of subject matter jurisdiction because while the Clean Air Act allows the Administrator to issue regulations, deciding to do so is discretionary. In 1977, the Clean Air Act was amended to include the Prevention of Significant Deterioration (“PSD”) program, which includes a provision that requires the Administrator to promulgate regulations regarding certain air pollutants. On appeal, plaintiffs argued that each time Congress sets a limit as to how much of a pollutant is allowed to be in the air, the Administrator is required to issue regulations. The Ninth Circuit read the PSD more narrowly, and determined that the non-discretionary rulemaking only referred to pollutants identified before 1979, and not to newly added chemicals.

Alliance for the Wild Rockies v. USDA, No. 13-35352, ___ F.3d ___ (9th Cir. Nov. 20, 2014), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2014/11/20/13-35253.pdf
Kary DeVaney, Willamette Law Online

Wild bison and grizzly bears inhabit areas within the Greater Yellowstone Area. The Yellowstone grizzly bear is a threatened species listed in the Endangered Species Act ("ESA"). According to a 2000 interagency document entitled the Interagency Bison Management Plan ("Management Plan"), wild bison are contained using helicopters in order to reduce brucellosis transfer to domestic cattle. Alliance for the Wild Rockies ("Alliance") provided 60-day notice of its intent to sue under the ESA and one week later, Alliance filed an Administrative Procedure Act ("APA") complaint alleging the helicopter hazing under the Management Plan harasses the Yellowstone grizzly bear. After 60 days, Alliance amended its complaint adding ESA claims.

The parties filed motions for summary judgment and the district court granted the federal defendants' motions, holding Alliance lacked standing to bring its claims because the Management Plan had not been enacted. On appeal, the Ninth Circuit held that the standing requirements of causation and redressability where met because the Management Plan was developed and approved by the federal defendants. The panel explained, a defendant need not fund or carrying out the plan to have caused an injury. Here, the federal defendant's approval of the plan establishes a connection to the injury and their discontinued use of the plan could repair it.

Sturgeon v. Masica, No. 13-36165, ___ F.3d ___ (9th Cir. Oct. 6, 2014), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2014/10/06/13-36165.pdf
Jacalyn Boyle, Willamette Law Online

Since 1971, John Sturgeon has hunted moose every year on the National River within the Yukon-Charly Rivers National Preserve, part of the National Park Service's National Preserve System ("Preserve System"). Sturgeon used a hovercraft on his hunting trips since 1990. In 2007, the National Park Service ("NPS") informed Sturgeon that hovercrafts are banned by the Yukon-Charly. Sturgeon did not use his hovercraft during the 2008 to 2010 hunting seasons within the preserve, but following the 2010 season, Sturgeon sued the NPS, Department of Interior, and individual federal employees, seeking a declaration that the NPS's ban on hovercraft violates §103(c) of the Alaska National Interest Lands Conservation Act ("ANILCA"), which he argues prevents NPS regulation on state-owned lands that fall within NPS in Alaska.

The State of Alaska intervened arguing a similar interpretation of the ANILCA regarding the NPS regulations for obtaining permits to conduct research on rivers within the Preserve System. The district court granted summary judgment to the federal agencies and employees on the grounds that neither Sturgeon nor Alaska properly interpreted the plain language of the ANILCA. On appeal, the Ninth Circuit found that Sturgeon met the requirements for standing because while he never suffered injury from the regulation, threatened enforcement actions qualify as Article III injuries. Alaska, however, did not have standing because the state already obtained the permits required by the NPS to conduct research in the rivers and it did not have plans to conduct future research. The panel also concluded that the ban on hovercraft could be upheld because the ban affected all types of lands within the conservation system unit ("CSU"),

or land within the Preserve System, not just public lands. The panel concluded that the plain language of §103(c) states NPS regulations that apply to both public and non-public land within the CSU can be enforced.

Friends of the Wild Swan v. Weber, No. 13-35817, ___ F.3d ___ (9th Cir. Sep. 24, 2014), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2014/09/24/13-35817.pdf
Anastasiya Krotoff, Willamette Law Online

In 2011, after conducting an Environmental Assessment ("EA") in consultation with the U.S. Fish & Wildlife Service ("USFWS"), the United States Forest Service ("Forest Service") authorized two logging projects in Montana's Flathead National Forest. The Forest Service determined that the logging projects would not adversely affect threatened species and habitats under the Endangered Species Act ("ESA"). The Friends of the Wild Swan ("Wild Swan") challenged the Forest Service's decision, claiming it violated the National Environmental Policy Act ("NEPA"), National Forest Management Act ("NFMA"), and ESA. The district court denied preliminary injunctive relief.

On appeal, the Ninth Circuit Court held that the Forest service did not arbitrarily and capriciously define the geographic scope of the EA under NEPA. That is, the Forest Service correctly analyzed potential cumulative effects on the environment and thus had discretion to limit the geographic scope accordingly in order to determine whether significant adverse environmental effects required additional assessments. On the NFMA claim, the panel concluded that Wild Swan did not establish a likelihood of success on the merits of their claim vis-à-vis the impact on wildlife because the Forest Service has discretion to determine which scientific methodologies to implement in conducting the EA. The panel further held that the Forest Service did not utilize an excessively narrow action area in the EA and therefore did not violate ESA, which required the Forest Service to consult with the USFWS to evaluate direct and indirect effects on the species and habitat in a particular action area, the Forest Service having discretion to chose which scientific methods to utilize in choosing the action area in question. Given the foregoing, the panel concluded that Wild Swan failed to establish that the logging projects posed a likelihood of irreparable harm in the absence of preliminary injunctive relief.

District of Oregon

Landwatch v. Connaughton, No. 6:13-CV-02027-AA (D. Or. Dec. 5, 2014)
Matthew Preusch, Case Notes Editor, Keller Rohrback L.L.P.

Plaintiffs Central Oregon Landwatch and Waterwatch of Oregon challenged the U.S. Forest Service's issuance of a special use permit that allowed the City of Bend to build a pipeline to facilitate the continued diversion of water from Tumalo Creek. The Plaintiffs alleged that the Forest Service's environmental assessment (EA) and issuance of the permit violate the National Environmental Policy Act ("NEPA"), the National Forest Management Act ("NFMA"), the Clean Water Act ("CWA"), and the Federal Land Policy Management Act ("FLPMA"). After

the City intervened, all parties moved for summary judgment. The court denied the plaintiffs' motion and granted those of the Forest Service and the City, dismissing the case.

On the NEPA claim, the court concluded that the Forest Service was not required to analyze the cumulative impact of diverting more than the permitted amount because such a diversion was not "reasonably foreseeable," and because such an additional diversion would "trigger a new round of environmental review and public input." The court also concluded that the Forest Service "relied on data that permitted a 'reasonably thorough discussion' of the Project's climate change impacts and therefore satisfied NEPA." Finally, the court also rejected the plaintiffs' claims that the Forest Service did not (1) consider adequate alternatives to the project, and that "the appropriate no action alternative was the discontinuation of the current water system"; (2) use adequate baseline data; or (3) properly forego a full Environmental Impact Statement.

The court also rejected plaintiffs NFMA argument, reasoning that the "Forest Service did not need to establish minimum flows because limiting the City's diversion to 18.2 cfs was sufficient to protect [Tumalo] Creek's resources." On the CWA claim, the court rejected plaintiffs' argument that the project would impermissibly impact water quality standards, concluding that "the record supports the Forest Service's conclusion that Tumalo Creek waters are not necessary to ensure colder temperatures downstream in the Deschutes River." Finally, the court also summarily dismissed the FLPMA claim, concluding that the statute "does not require the Forest Service to undertake any specific actions."

Oregon Court of Appeals

Waterwatch of Oregon, Inc. v. Water Resources Dept., Nos. A148870, A148872, A148874, ___ Or. App. ___ (Dec. 31, 2014), *available at* http://www.publications.ojd.state.or.us/docs/A148870.pdf
Steven Mastanduno, Willamette Law Online

Waterwatch of Oregon, Inc. (Waterwatch) challenged three final orders of the Water Resources Department (WRD), which granted extensions of time to perfect water rights with diversions in the lower Clackamas River to the City of Lake Oswego, the South Fork Water Board, and the North Clackamas Water Commission. Waterwatch argued that the WRD misapplied ORS 537.230(2)(c), which states WRD must find the "undeveloped portion of the permit is conditioned to maintain . . . the persistence of fish species listed as sensitive, threatened or endangered under state or federal law." Waterwatch further argued that WRD's conclusions about fish persistence were not supported by substantial evidence or reason.

The Court held that, while WRD applied a correct interpretation of the statute, the determination that the permits would maintain the persistence of listed fish lacked both substantial evidence and substantial reason. The Court found WRD failed to explain how its findings supported its conclusions that undeveloped portions of the permits would maintain the persistence of the listed fish species when the conditions fail to ensure that the diversions of would not contribute to long-term drops below persistence flows. The Court reversed and remanded all three cases.

Agency Orders

Oregon Department of State Lands, Order Denying State of Wyoming's Request for Rehearing (Oct. 1, 2014)
Daniel Timmons, Marten Law
Summary reprinted with permission of and first published by Marten Law at:
http://www.martenlaw.com/newsletter/20141114-key-permit-coal-export-facility#_ftn7

After a lengthy permitting process, the Oregon Department of State Lands ("DSL") denied an application for a state removal/fill permit (similar to a Clean Water Act 404 permit) needed for construction of dock facilities associated with a multi-modal coal export facility proposed for the Port of Morrow ("Port"). Specifically, DSL determined that "[1] the project is not consistent with the protection, conservation and best use of the water resources of this state as specified in ORS 196.600 to 196.905, and [2] it would unreasonably interfere with the paramount policy of this state to preserve the use of its waters for navigation, fishing and public recreation." Underlying both determinations is the agency's conclusion that the project would negatively impact a "small, but important" Columbia River fishery.

The applicant, Coyote Island Terminal, LLC and Ambre Energy North America, and the Port have appealed the denial of the permit, arguing that DSL's denial was improperly influenced by the politics of coal and amounted to a failure to administer its rules "to ensure persons receive timely, fair, consistent and predictable treatment including timely communication and consistent application and interpretation of these rules and the Removal-Fill Law." OAR 141-085-0506. The appeals will be consolidated in a single contested case before the Office of Administrative Hearings.

The State of Wyoming also appealed, alleging that the denial decision constitutes an unconstitutional restriction of interstate commerce. DSL, however, denied Wyoming's request to be heard based on state regulations, which limit standing to persons "adversely affected or aggrieved." The regulations provide that "[t]o be 'adversely affected' by the Department's individual removal-fill permit decision, the person must have a legally protected interest that would be harmed, degraded or destroyed by the authorized project." OAR 141-085-0575. Since Wyoming argued that it would be harmed by the permit denial, DSL reasoned that the state was not harmed by the authorized project. Further, the state was not "aggrieved" because it did not submit timely comments during the permitting process.

Both Montana and Wyoming subsequently submitted petitions to participate as parties in the consolidated contested case. DSL recently denied full party status to the states, but granted them each "limited party" status. Accordingly, the states will have the right to fully participate as parties, but only with respect to the social, economic, and public benefits from the project. Importantly, the states will not be allowed to present evidence regarding the existence or scope of the fishery at the terminal site. DSL has also granted limited party status to several environmental groups.

Since the DSL decision, the Australia-based applicant has reportedly begun the process of selling off its North American coal assets, including its interests in the proposed Port of Morrow facility.