ENR Case Notes, Vol. 21

Recent Environmental Cases and Rules

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

Editor's Note: This issue contains selected summaries of cases issued in January, February, and March of 2015. Thank you to Willamette Law Online, which provides case summaries and first publishes those summaries at http://www.willamette.edu/wucl/resources/journals/wlo/. Thank you also to Jacob Booher, a 3L at Lewis & Clark Law School, for his summary. If you are interested in summarizing cases and rules, please contact me.

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CASES

9th Circuit Court of Appeals

- ***NRDC v. EPA***, No. 13-70544, ___ F.3d ___ (9th Cir. Mar. 11, 2014)
- ***Black Mesa Water Coalition v. Jewell***, No. 12-16980, ___ F.3d ___ (9th Cir. Jan. 26, 2014)

District of Oregon

- ***Wild v. Bureau of Land Management***, No. No. 6:14–CV–0110–AA (D. Or. Mar. 14, 2014)

Oregon Supreme Court

- ***State v. Dickerson***, No. S062108, ___ Or. ___ (Mar. 12, 2015)

Oregon Court of Appeals

- ***Fick v. Oregon Dept. of Fish and Wildlife***, No. A153317, ___ Or. App. ___ (Mar. 18, 2015)

Agency Orders

- ***NOAA/EPA,*** *Finding That Oregon Has Not Submitted a Fully Approvable Coastal Nonpoint Program* (Jan. 30, 2015)

9th Circuit Court of Appeals

NRDC v. EPA, No. 13-70544, ___ F.3d ___ (9th Cir. Mar. 11, 2014), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2015/03/11/13-70544.pdf
Sydney Safley, Willamette Law Online

Natural Resources Defense Council and Communities for a Better Environment (collectively, "NRDC") appealed from a denial for review of an order approving a revision to the Clean Air Act ("CAA"). The revision, South Coast Air Quality Management District's Rule 317 ("Rule 317"), created "not less stringent" controls, which tightened the air quality standard in the applicable district.

The Environmental Protection Agency ("EPA") approved Rule 317 in 2013. NRDC argued that the EPA had no authority to approve Rule 317 because it is an alternative to section 172(e) of the CAA, which unambiguously allows the EPA to approve of alternate pollution controls only when such controls are "relaxed." Resolution of that issue required use of the familiar two-step framework from *Chevron U.S.A., Inc. v. Natural Resources Defense Council* for reviewing an agency's interpretation of a statute. Under that framework, the court must first determine if "Congress has directly spoken to the precise question at issue." If so, then the court must apply the statute as Congress intended. If not, then the court must next determine if the agency's interpretation is "based on a permissible construction of the statute."

Applying *Chevron*, the Ninth Circuit concluded that in regards to section 172(e), Congress did not directly speak to the precise question at issue because the statute does not provide guidelines in any context except for when air quality controls are relaxed. Therefore, the panel applied the second step of *Chevron*. The panel deferred to the EPA's interpretation, concluding it was reasonable because it paralleled a previous interpretation of another part of the same sentence within section 172(e). Furthermore, it was clear that Congress intentionally left a gap in the statute that must be filled by the agency. The panel therefore denied the petition.

Black Mesa Water Coalition v. Jewell, No. 12-16980, ___ F.3d ___ (9th Cir. Jan. 26, 2014), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2015/01/26/12-16980.pdf
Nicole Morrow, *Willamette Law Online*

Black Mesa Water Coalition ("Black Mesa"), a group of environmental and community organizations, challenged a permit revision granted by the Federal Office of Surface Mining Reclamation and Enforcement for coal mining operations in northeastern Arizona. Black Mesa was successful and thereafter sought costs and expenses, including attorney and expert witness fees. The Administrative Law Judge denied their request, concluding that the plaintiff was not "eligible," and was not "entitled" to costs and expenses under 43 C.F.R. § 4.1294(b). The Interior Board of Land Appeals affirmed the ruling.

On appeal, the Ninth Circuit determined that the proper review of an agency's "eligibility" determination is *de novo*, and its "entitlement" determination is reviewed for substantial evidence. Applying those standards, the panel reversed the Board, holding that Black Mesa was "eligible" for fees because it demonstrated some degree of success on the merits by

making arguments early in the merits stages of the administrative proceedings. The panel also determined that the issue of "entitlement" should be remanded for the agency to consider because it is a factual finding made at the agency level.

District of Oregon

Wild v. Bureau of Land Management, No. No. 6:14–CV–0110–AA (D. Or. Mar. 14, 2014)
Matthew Preusch, Keller Rohrback L.L.P.

Plaintiffs Oregon Wild and Cascadia Wildlands (collectively, "Plaintiffs") challenged the Bureau of Land Management's ("BLM") authorization of a pilot project in BLM's Roseburg District intended to apply the principles of "ecological restoration" developed by the prominent forestry experts Jerry F. Franklin and K. Norman Johnson. Plaintiffs alleged that, in approving the project, the BLM violated the National Environmental Policy Act ("NEPA") by failing to analyze an adequate range of alternatives, not preparing an Environmental Impact Statement, and failing to take a "hard look" at environmental consequences. Plaintiffs also claimed BLM violated the Federal Land Policy and Management Act ("FLPMA") and the Administrative Procedure Act ("APA").

Chief Judge Ann Aiken agreed that BLM violated NEPA and the APA, so it did not reach Plaintiffs' FLPMA claims. In first summarizing the project, the court found that the project "would effectively remove 160 acres of 'mature forest,' defined as stands over 80 years old." The court also noted that the U.S. Fish & Wildlife Service's biological opinion concluded that the project "would 'adversely affect' northern spotted owls, their critical habitat, and their prey such as red tree voles but would not jeopardize the continued existence of the northern spotted owl as a species."

Turning to Plaintiffs' claims, the court first agreed with Plaintiffs that BLM violated NEPA by not considering a reasonable alternative of which it was aware. Next, the court concluded that factors like the project's controversial nature and likely impact on owls merited creating an EIS. Third, the court concluded that BLM "fail[ed], in multiple respects, to take a hard look at the project's environmental effects." The court therefore granted Plaintiffs' motion for summary judgment on their NEPA claim and set aside the BLM's authorization of the project.

Oregon Supreme Court

State v. Dickerson, No. S062108, ___ Or. ___ (Mar. 12, 2015), *available at* http://www.publications.ojd.state.or.us/docs/S062108.pdf
Nathan Holden, Willamette Law online

Defendant appealed his conviction for second-degree criminal mischief. Defendant and his son shot at two state-owned wildlife decoys, which they believed were wild deer. Oregon State Police troopers observed defendant shooting the decoys after legal hunting hours. At trial, defendant argued that he did not intentionally damage "property of another", because he believed that the wildlife decoys were wild deer, and therefore not "property of another". The State

argued that it has a sovereign interest in wildlife, and therefore the intent to damage "property of another" is applicable. The trial court agreed with the State.

Defendant appealed and the Court of Appeals affirmed the trial court's decision. The Supreme Court reviewed the decision to resolve the issue of whether wild deer are "property of another". The Court looked to the definition of "property of another" under ORS 164.305(2), and whether the State's "sovereign interest" in wildlife is a "legal or equitable interest" under the statute. The Court affirmed the conviction, holding that the State's interest in wildlife is both a legal interest derived from common law, and is codified in Oregon Code 39-201(1930).

Oregon Court of Appeals

Fick v. Oregon Dept. of Fish and Wildlife, No. A153317, ___ Or. App. ___ (Mar. 18, 2015), *available at* http://www.publications.ojd.state.or.us/docs/A153317.pdf
Steven Mastanduno, Willamette Law Online

Petitioners sought judicial review of rules governing the Columbia River gill-net fishery adopted by the Oregon Department of Fish and Wildlife ("ODFW"), arguing they should be declared invalid on multiple grounds. On appeal, the court discussed on one of those grounds: petitioners' argument that the rules did not comply with ORS 183.540, which pertains to the reduction of economic impact of rules on small businesses.

Petitioners maintained ODFW failed to consider the economic impact of the new rules regarding non-tribal recreational and commercial fisheries, arguing based on the statute that when a "small business impact statement shows a significant adverse effect on small business, the agency must reduce the impact of the rules on those businesses to the extent consistent with the regulatory purpose." ODFW argued the small business impact statement did not show a significant adverse effect, so the statute's requirements were not triggered, and that in any case the state would mitigate any harm to small businesses.

The Court of Appeals concluded that "the statute requires limiting the economic effect of a rule on small business when the expense of complying with the rule is substantial—but not at the cost of excusing compliance with the substance of the rule." ODFW considered the economic effect of the rules and attempted to mitigate the effect, but determined additional action was not required as it would be inconsistent with the purpose of the rules. "The agency was not required to act in a manner directly inconsistent with the purpose of the rules and did not violate the statute by declining to do so." The Court of Appeals therefore upheld OAR 635-500-6700 to 635-500-6765.[1]

Agency Orders

NOAA/EPA, Finding That Oregon Has Not Submitted a Fully Approvable Coastal Nonpoint Program (Jan. 30, 2015), *available at* http://coast.noaa.gov/czm/pollutioncontrol/
Jacob Booher, 3L, Lewis & Clark Law School

[1] Case notes editor Matthew Preusch was on the state's brief.

The U.S. Environmental Protection Agency ("EPA") and the National Oceanic and Atmospheric Administration ("NOAA") rejected Oregon's Coastal Nonpoint Pollution Control Program (the "Program") on the grounds that Oregon's program does not contain forest management measures necessary to achieve and maintain water quality standards that protect designated uses of coastal waters.

Pursuant to section 6217(a) of the Coastal Zone Act Reauthorization Amendments of 1990 ("CZARA"), 16 U.S.C. § 1455b, Oregon is required to develop a program that describes how the state will prevent and control polluted runoff in coastal waters. In 2013, NOAA and EPA notified Oregon of its intent to reject Oregon's Program, citing multiple deficiencies. NOAA and EPA's current decision notes that although Oregon remedied many of the deficiencies the agencies highlighted in 2013, Oregon failed to sufficiently address forestry-related runoff that harms coastal water quality and habitat for endangered coastal salmon and trout. Specifically, EPA and NOAA found Oregon's Program lacking in four main forest management areas: (1) riparian protection for medium and small fish-bearing streams and non fish-bearing streams; (2) practices that reduce runoff from old, unused forest roads; (3) practices to reduce runoff from landslide-prone areas; and (4) assurances that herbicides are properly applied to reduce impact on waterways.

NOAA and EPA's rejection of Oregon's Program means that Oregon is subject to economic sanctions. The CZARA provides for NOAA and EPA to withhold funds granted to the state under the Coastal Zone Management Act and the Clean Water Act from states with deficient programs. 16 U.S.C. § 1455b(c)(3). Oregon could lose up to $1.3 million next year in federal funds for Oregon's Department of Environmental Quality and Department of Land Conservation and Development. If Oregon does not remedy its Program, NOAA and EPA may begin withholding funds as early as July 1, 2015.