ENR Case Notes, Vol. 23

Recent Environmental Cases and Rules

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

Editor's Note: This issue contains selected summaries of cases issued in July, August, and September 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 Oliver Stiefel of Crag Law Center for his summary. If you are interested in summarizing cases or rules, please contact me.

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9th Circuit Court of Appeals

- ***Cascadia Wildlands et al. v Bureau of Indian Affairs***, No. 14-35553, ___ F.3d ___ , (9th Cir., Sep 11, 2015)
- ***Pollinator Stewardship Council v. U.S. E.P.A.***, No. 13-72346, ___ F.3d ___ , (9th Cir., Sep 10, 2015)
- ***ONRC Action v. U.S. Bureau of Reclamation***, No. 12-35831, ___ F.3d ___ , (9th Cir., Aug 21, 2015)

District of Oregon

- ***Am. Fuel & Petrochemical Mfrs. v. O'Keeffe***, No. 3:15-CV-00467-AA, 2015 WL 5665232, ___ F. Supp. 3d. ____ (D. Or. Sept. 23, 2015)
- ***Oregon Natural Desert Ass'n v Bureau of Land Mgmt.,*** No. 3:08-cv-01271-KI, 2015 WL 4959837, ___ F. Supp. 3d. ____ (D. Or. Aug. 19, 2015)
- ***League of Wilderness Defenders, et al. v. Peña, et al.***, No. 3:12-cv-02271-HZ (D. Or. Dec. 9, 2014/Apr. 6, 2015)

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- ***State v. Waters***, No. A153894, ___ Or. App.___ , (Sep. 16, 2015)
- ***Oil Re-Refining Co. v. Dept. of Environ. Quality***, No. A149365, 273 Or. App. 502, (Sept. 10, 2015)

9th Circuit Court of Appeals

Cascadia Wildlands et al. v Bureau of Indian Affairs, No. 14-35553, ___ F.3d ___ , (9th Cir., Sep 11, 2015), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2015/09/11/14-35553.pdf
Edgar Diaz, Willamette Law Online

In 2013, The Bureau of Indian Affairs ("BIA") approved the Coquille Indian Tribe's plan, the Middle Forks Kokwel project, to harvest 268 acres of timber from the Coquille Forest in southwest Oregon. The project's stated purpose was to raise money for the Tribe. Though the BIA, the Tribe, and the U.S. Fish and Wildlife Service ("FWS") found the project could harm to the northern spotted owl, the project's Environmental Assessment ("EA") concluded that the threatened species' habitat would not diminish. The project was approved in February 2013 by the BIA without conducting an Environmental Impact Statement ("EIS").

Cascadia Wildlands, Oregon Wild, and Umpqua Watersheds, Inc. (collectively, "Cascadia") challenged that approval, and the District Court granted summary judgment to both the BIA and the Tribe. On appeal, the Ninth Circuit reviewed Cascadia's claim that BIA and the tribe violated National Environment Protection Act, 42 U.S.C. § 4321 *et seq*. ("NEPA"). NEPA requires preparation of an EIS for "major Federal actions affecting the quality of the human environment." Cascadia argued that it was improper to aggregate the impacts of another, adjacent logging project—Alder/Rasler— that had been approved but not been completed into the environmental baseline for the purposes of the NEPA analysis of the Kokwel project. The panel disagreed, reasoning that the Kolwel EA appropriately assumed that present activities would continue during future projects. Additionally, Cascadia claimed that the Kokwel project was in violation of the Coquille Restoration Act (CRA) because it is not consistent with the northern spotted owl's FWS recovery plan. The panel, however, found that the CRA did not require the Kokwel Project to comply with it because it expresses an objective of compliance.

Pollinator Stewardship Council v. U.S. E.P.A., No. 13-72346, ___ F.3d ___ , (9th Cir., Sep 10, 2015), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2015/09/10/13-72346.pdf
Stephanie Case, Willamette Law Online

The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") prohibits the use or sale of pesticides without the approval of the Environmental Protection Agency ("EPA"). FIFRA enables the EPA to deny pesticide registrations in order to prevent unreasonable adverse effects to people or the environment. In 2010, Dow Agrosciences LLC applied for approval under FIFRA of pesticides containing sulfoxaflor.

In evaluating sulfoxaflor, the EPA used the Pollinator Risk Assessment Framework. The assessment revealed that the median lethal doses found in sulfoxaflor were extremely toxic to bees. The risk quotients exceeded the 0.4 level at which "the EPA express[ed] concerns serious enough to require further testing." There were issues as to the accuracy of the tests performed,

causing the EPA to conclude that additional studies were needed. Despite the lack of any further testing being conducted, the EPA later unconditionally registered sulfoxaflor, justified by various user instruction mitigation measures.

Several commercial beekeepers challenged the EPA's approval of insecticides containing sulfoxaflor. On review, the Ninth Circuit noted it was only required to uphold EPA decisions supported by substantial evidence when considered on the record as a whole. The panel then held that the studies' results showed insufficient and inconclusive data on the effects of sulfoxaflor. The panel said an agency's action must be upheld, if at all, on the basis articulated by the agency's standards. The panel found that the EPA's unconditional registering of sulfoxaflor in the absence of sufficient data documenting the risk to bees was inappropriate given the agency's own risk assessment standards. The panel determined that the EPA's decision to unconditionally register sulfoxaflor was based on flawed and limited data, and the approval was not supported by substantial evidence. The panel vacated the registration and remanded for the EPA to obtain further studies.

ONRC Action v. U.S. Bureau of Reclamation, No. 12-35831, ___ F.3d ___ , (9th Cir., Aug 21, 2015), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2015/08/21/12-35831.pdf
Adam Mentzer, Willamette Law Online

ONCR Action is an Oregon-based environmental group that filed a citizen's suit under the Clean Water Act ("CWA"), alleging that the Bureau of Reclamation ("the Bureau") and other defendants violated the CWA by dumping pollutants into the Klamath River from the Klamath Straits Drain ("KSD") without a permit. Specifically, ONCR Action alleged that the Bureau has been adding pollutants from a point source to navigable waters in violation of 33 U.S.C. § 1311(a).

The magistrate judge granted summary judgment to the Bureau, finding that the discharge of pollution from the KSD was exempt under § 1311(a) of the CWA. ONCR Action appealed. On appeal, the Ninth Circuit upheld the district court's order granting summary judgment, holding that when water is transferred between different portions of a body of water, no pollution is added. The panel found that the KSD was not a meaningfully distinct body of water from the Klamath River, and that therefore no permit was required by the CWA.

District of Oregon

Am. Fuel & Petrochemical Mfrs. v. O'Keeffe, No. 3:15-CV-00467-AA, 2015 WL 5665232, ___ F. Supp. 3d. ____ (D. Or. Sept. 23, 2015)
Matthew Preusch, Keller Rohrback L.L.P.

In January, the Environmental Quality Commission adopted a set of rules governing transportation fuels, OAR. 340–253–0100–250, 340–253–0400, 340–253–8010–20, part of the state's plan to reduce greenhouse gas emissions from the transportation sector. In response, the American Fuel and Petrochemical Manufacturers, American Trucking Associations, Inc., and Consumer Energy Alliance filed suit, arguing the rules and the fuel credit program they establish (1) discriminate against out-of-state commerce in violation of the Commerce Clause; (2) regulate extraterritorial activity in violation of the Commerce Clause and principles of interstate federalism; (3) are expressly preempted by section 211(c) of the Clean Air Act ("CAA") and the Environmental Protection Agency's ("EPA") Reformulated Gasoline Rule ("RFGR"); and (4) are conflict preempted by section 211(o) of the CAA, which contains the Renewable Fuel Standard ("RFS") as amended by the Energy Independence and Security Act ("EISA"). The state and interveners—the states of California and Washington, and a coalition of environmental organizations—moved to dismiss and for a judgment on the pleadings.

Chief Judge Ann Aiken rejected the plaintiffs' arguments and granted the motions. First, the court held that Oregon's clean fuel program "is not facially discriminatory because it distinguishes among fuels based on lifecycle GHG emissions, not origin or destination[,]" and does not have a discriminatory purpose because its purpose is to reduce GHG emissions, and does not have a discriminatory effect because there were "no plausible allegations demonstrating that out-of-state [fuel] producers will be commercially disadvantaged or considerably burdened" by the program. Second, the court found the program did not regulate activity wholly outside the state. Third, the court rejected the argument that the program was expressly preempted by federal law or preempted because it conflicted with federal law. The court therefore granted the motions and dismissed the plaintiffs' claims. Plaintiffs have filed a notice of appeal.

Oregon Natural Desert Ass'n v Bureau of Land Mgmt., No. 3:08-cv-01271-KI, 2015 U.S. Dist. LEXIS 109271, 2015 WL 4959837 (D. Or. Aug. 19, 2015)
Oliver Stiefel, Crag Law Center

This case involved a second round of litigation over the Bureau of Land Management's ("BLM") plan to control juniper expansion on Steens Mountain in southeastern Oregon (the "Juniper Project"). In the first round of proceedings, the court granted in part and denied in part the parties' cross-motions for summary judgment, and remanded a limited issue: whether the Juniper Project impermissibly allows off-road motorized use in Wilderness Study Areas, in violation of the Steens Mountain Cooperative Management and Protection Act ("Steens Act"). After remand proceedings, Plaintiff Oregon Natural Desert Association ("ONDA") moved to reopen the litigation. On cross-motions for summary judgment, the court held in favor of ONDA.

The Steens Act provides that "the use of motorized or mechanized vehicles . . . is prohibited off road . . . ." The statute also contains two exceptions, permitting off-road use if (A) "needed for administrative purposes or to respond to an emergency"; or (B) "appropriate for . . . ecological restoration projects, except in areas designated as wilderness or [Wilderness Study Areas]." Although BLM did not dispute that this was an "ecological restoration" project, it relied on the first exception in approving the Juniper Project, which involved the use of excavators in Wilderness Study Areas. According to BLM, the second exception applied only to private parties, such as cooperating landowners needing access on or over public lands.

The court addressed the issue under the familiar "two-step" set forth by the Supreme Court in *Chevron U.S.A, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984), and agreed with ONDA that the statutory language was clear and unambiguous at *Chevron* step one. The court rejected BLM's contrary interpretation on two grounds. First, it would render the second exception a nullity, because BLM could avoid the specific prohibition on off-road travel in Wilderness Study Areas simply by labeling a project "administrative." Second, BLM's assertion that the second exception applied only to private parties was unsupported by the language of the statute or agency practice. The plain language of both exceptions applies to off-road driving by all users—whether BLM personnel or private parties. Moreover, under prior cooperative agreements, BLM had delegated "administrative" tasks to private parties.

Accordingly, the court held that BLM could not rely on the "administrative purposes" exception, where the "ecological restoration" exception explicitly applied to the project. And under the latter exception, the statutory language is plain: the use of off-road motorized vehicle use in Wilderness Study Areas for the purpose of implementing an ecological restoration project is prohibited. The decision to allow such use was therefore arbitrary, capricious, an abuse of discretion and otherwise not in accordance with the Steens Act. The court reserved the issue of remedy pending further briefing, but explained that under the APA, the normal remedy for an unlawful agency action is vacatur.

Oregon Court of Appeals

State v. Waters, No. A153894, ___ Or. App.___ , (Sept. 16, 2015), *available at* http://www.publications.ojd.state.or.us/docs/A153894.pdf
Bailey Moody, Willamette Law Online

Defendant was observed engaging in suction-dredge mining without a permit on two separate occasions and charged with violating state water pollution laws. The state alleged that Defendant "unlawfully and with criminal negligence violate[d] [ORS] 468B.050 by . . . operating a small suction dredge without a 700-PM permit . . . which would otherwise alter the . . . properties of a water of the state in a manner not already authorized." Defendant demurred, making several arguments concerning the statement's lack of stated offense. The trial court denied the demurrer, and Defendant was convicted of the charged crime.

Defendant appealed, arguing that the trial court improperly denied his demurrer. Specifically, Defendant argued that the Department of Environmental Equality (DEQ) did not have the authority to issue the permit Defendant lacked, and that the statement did not identify a change or addition his actions made to the water. The Oregon Court of Appeals found that the charging statement in question "contained all elements of the offense with which Defendant was charged," and that Defendant's argument that DEQ lacked the authority to issue him the required permit did not absolve Defendant's liability to obtain the required permit. The Court did not decide whether suction dredging causes a "discharge" or "addition" requiring a NPDES permit. The Court held that the trial court did not err when it denied Defendant's demurrer.

Oil Re-Refining Co. v. Dept. of Environ. Quality, No. A149365, 273 Or. App. 502, (Sept. 10, 2015), *available at* http://www.publications.ojd.state.or.us/docs/A149365.pdf
Caitlynn Dahlquist, Willamette Law Online

The Department of Environmental Quality ("DEQ") sought to fine the Oil Re-Refining Company ("ORRCO") for "transporting and treating hazardous waste without a required manifest and permit" in violation of 40 CFR § 263.20(a)(1) and ORS 466.095(1)(c). ORRCO appealed the ruling by the Environmental Quality Commission, claiming they treated the waste as nonhazardous because they believed that was the proper characterization. The Court of Appeals held that 40 CFR § 263.20(a)(1) and ORS 466.095(1)(c) are strict liability rules, thereby rendering irrelevant ORRCO's mental state at the time of the charged violation.