ENR Case Notes, Vol. 25

Recent Environmental Cases and Rules

Environmental and Natural Resources Section — Oregon State Bar
Meredith Price, Editor — April 2016

Editor's Note: This issue contains selected summaries of cases issued in January, February, and March of 2016. Thank you to Steve Thiel of Lewis & Clark Law School, Marianne Dugan, Attorney at Law, Oliver Stiefel of Crag Law Center, Marla Nelson of WildEarth Guardians, Chris Thomas of The Freshwater Trust, Cody Gregg of Willamette Law, and Eric B. Fjelstad, Donald Baur, Laura Wolff, Marc R. Bruner, Jena A. MacLean, Odin Alonso Smith, Stephanie M. Regenold, Robert A. Maynard, and Laura Godfrey Zagar of Perkins Coie LLP, for their summaries. If you are interested in summarizing cases or rules, please contact me.

Meredith Price
Perkins Coie LLP
MPrice@perkinscoie.com

9th Circuit Court of Appeals

- ***Alaska Oil & Gas Ass'n v. Jewell***, 815 F.3d 544 (9th Cir. 2016)
- ***Arizona ex rel. Darwin v. U.S. E.P.A.***, 815 F.3d 519 (9th Cir. 2016)
- ***City of Mukilteo v. U.S. Dep't of Tranp.***, 815 F.3d 632 (9th Cir. 2016)
- ***Idaho Wool Growers Ass'n v. Vilsack***, No. 14-35445, 2016 WL 805683, --- F.3d --- (9th Cir. Mar. 2, 2016)
- ***San Diego Navy Broadway Complex Coal. v. U.S. Dep't of Def.***, No. 12-57234, 2016 WL 1237404, --- F.3d --- (9th Cir. Mar. 30, 2016)

District of Oregon

- ***Bark v. Northrop***, No. 3:13-CV-00828-AA, 2016 WL 1181672 (D. Or. Mar. 25, 2016)
- ***Bohmker v. State***, No. 1:15-CV-01975-CL, 2016 WL 1248729, --- F. Supp. 3d --- (D. Or. Mar. 25, 2016)
- ***McKenzie Flyfishers v. McIntosh***, No. 6:13-CV-02125-TC, 2016 WL 446880, --- F. Supp. 3d --- (D. Or. Jan. 22, 2016)

Federal Administrative Rules

- **U.S. Fish and Wildlife Service Updates Native American Tribe Policy**, 81 Fed. Reg. 4638 (Jan. 27, 2016)
- **Proposed Revisions to the U.S. Fish and Wildlife Service Mitigation Policy**, 81 Fed. Reg. 12380 (Mar. 8, 2016) (Proposed Revisions)

A. 9th Circuit Court of Appeals

1. Alaska Oil & Gas Ass'n v. Jewell, 815 F.3d 544 (9th Cir. 2016). *Authors:* Eric B. Fjelstad, Donald Baur, and Laura Wolff of Perkins Coie LLP.

In a decision that could result in significant new restrictions on development activities in the Arctic as well as set important Endangered Species Act (ESA) precedent in the Western United States, the U.S. Court of Appeals for the Ninth Circuit recently reversed an Alaska district court's judgment vacating the designation of critical habitat in Alaska for the polar bear.

In 2008, the United States Fish & Wildlife Service (FWS) listed the polar bear as threatened. Once a species is listed, the ESA requires FWS to designate habitat critical to the conservation of the species. In 2010, FWS issued a rule designating approximately 187,000 square miles as critical habitat for the polar bear, an area larger than the state of California. Nearly 96% of the total designated area is sea ice. The other approximate 4% consists of a five-mile band of terrestrial denning sites and barrier islands, including a one-mile radius around those islands.

In response to FWS's rule, the state of Alaska, Native corporations and villages, and oil and gas associations sued the agency, alleging multiple violations of the ESA and Administrative Procedure Act. As to the 4% of terrestrial and barrier island habitat, the district court agreed with two of the plaintiffs' claims. It held that the rule was arbitrary and capricious for being unjustifiably large and that FWS violated procedural requirements of the ESA by failing to adequately respond to comments. The court then vacated the entire rule.

A unanimous panel reversed the district court's vacatur, reinstating the critical habitat designation. In its opinion, the Ninth Circuit ruled that the district court imposed a level of specificity the ESA does not require. The court held that FWS can designate an area for a particular reason critical to a species' survival without proof that the species engages in that activity in that area. In this case, the Ninth Circuit concluded that FWS could designate an area to protect denning sites even though the agency lacked proof that such sites actually existed. FWS looked at the factors that make for good denning sites (e.g., steep, stable slopes, access between the den and coast, proximity to sea ice in the fall and freedom from human disturbance) to determine whether the habitat was suitable for denning and thus worthy of critical habitat designation. The court considered this analysis to be sufficient to sustain the critical habitat designation.

In an element of the decision that has potentially far-reaching implications for other ESA actions, the court stated that the ESA requires use of the best scientific data available, not the best scientific data possible. The best scientific data available does not necessarily lend itself to pinpointing precise locations of denning sites, according to the Ninth Circuit. For instance, the court found that FWS's reliance on a study monitoring female polar bears from 1982 to 2009 satisfied the best-scientific-data-available requirement. When coupled with an analysis of factors indicative of good denning sites, the designation was not arbitrary and capricious.

The court further held that it is appropriate to consider future climate change, such as

receding sea ice, when designating habitat. The court reasoned that just as courts have recognized climatic factors when listing a species, so too can such factors be used in the designation process.

Lastly, the court upheld FWS's reasoning for excluding some human structures and activities from designation, like the city of Barrow, Alaska, while including others, like the industrialized area of Deadhorse, Alaska. The court found that the record showed routine polar bear activity and denning near Deadhorse and that despite some human activity, polar bears could still move through Deadhorse to access den sites.

As for the alleged procedural violation, the court disagreed with the district court that FWS did not adequately explain why it did not incorporate the state's comments into its regulation. The alleged procedural violation stemmed from section 4(i), 16 U.S.C. § 1533(i), which requires written justification for FWS's failure to adopt regulations consistent with a state's comments. The Alaska Department of Fish and Game (ADFG) submitted detailed comments. FWS responded to ADFG's comments by sending a letter to Governor Parnell. The court held (1) section 4(i) is judicially reviewable; (2) a letter to the governor satisfies the procedural requirement; (3) a response that references other publicly available documents in support of its justifications is not necessarily defective; and (4) FWS's letter effectively addressed ADFG's comments.

2. **Arizona ex rel. Darwin v. U.S. EPA**, 815 F.3d 519 (9th Cir. 2016). *Author*: Steve Thiel of Lewis & Clark Law School.

The State of Arizona and the Salt River Project Agricultural Improvement and Power District (SRP) filed suit challenging an EPA rule that disapproved parts of emission limits proposed by Arizona pursuant to Sections 169A and 169B of the Clean Air Act (CAA). In addition, the plaintiffs challenged EPA's concurrent promulgation of a Federal Implementation Plan (FIP). As required by the CAA to address visibility concerns in Class I areas such as national parks, Arizona proposed a State Implementation Plan (SIP) including proposed progress goals and long-term strategies to meet those goals. As part of those strategies, Arizona determined what constituted best available retrofit technology (BART) for three fossil fuel power plants, including Coronado Generating Station. EPA reviewed Arizona's SIP for consistency with the CAA and its regulations, and issued a Final Rule partially approving the SIP while disapproving its emission limits for NOx at Coronado. In addition, EPA simultaneously issued a FIP for the portions of Arizona's SIP that had been disapproved, replacing the SIP's controls with more stringent ones that would result in a much lower emission limit.

Before addressing the Arizona's challenges to the EPA actions, the Court first considered the plaintiffs' assertion that, rather than deferring to the expert judgments of the federal agency, the Court should defer to the state, to which the CAA gives initial authority to determine BART. The Court rejected the plaintiffs' position, concluding that EPA is due deference because of its substantive role in reviewing state SIPs. The Court then considered Arizona's claim that EPA was arbitrary when, in the Final Rule, the agency acted on the BART determinations at issue in the case but deferred action on the rest of Arizona's SIP. The Court concluded that the CAA explicitly permits EPA to approve or disapprove a SIP in part. Further, BART determinations

are freestanding and independent of long term visibility goals. As such, EPA was not acting arbitrarily when it chose to focus its Final Rule on some, but not all, of Arizona's SIP.

Next, the Court considered the plaintiffs' substantive challenges to EPA's disapproval of parts of the SIP. First, Arizona took issue with EPA's conclusion that the SIP's calculations of the costs of emission controls were not performed in accordance with EPA regulations implementing the CAA. EPA had disapproved those calculations because Arizona had relied on summaries of costs provided by SRP, as opposed to line item details of costs. The Court sided with the agency, holding that EPA was reasonable in concluding that Arizona could not have fulfilled its statutory duty to consider the cost of compliance with such sparse information. Second, the Court rejected the plaintiffs' challenge to EPA's decision to disapprove the SIP's BART determination due to improper analysis of the visibility improvements that would result from more stringent emission controls. Arizona had employed two contradictory approaches for forecasting improvements which understated the potential benefits of controls in some areas and concealed the lack of improvement in others. The Court found that such inconsistency, along with a lack of explanation, provided a reasonable basis for EPA's action. Third, the Court held that EPA did not act arbitrarily when it rejected Arizona's Coronado BART determination as lacking sufficient explanation of how the state applied the CAA's five BART factors.

The Court then addressed Arizona and SRP's arguments challenging EPA's issuance of the FIP. The Court again sided with the agency on the first two of the plaintiffs' challenges. First, EPA rightly used cumulative analysis as a supplement to consideration of visibility improvements specifically at Coronado. Second, EPA was justified in choosing to incorporate the Integrated Planning Model—a model of costs and other variables affecting the country's electric grid—and its own Cost Manual in its decision making. The Court declined to rule on the plaintiffs' third argument while EPA works to complete a revised FIP. Finally, Arizona and SRP argued that EPA acted unlawfully by promulgating its FIP simultaneously with the Final Rule disapproving of portions of the SIP. The Court again upheld EPA's action, explaining that the CAA's requirement that a FIP be issued "at any time within 2 years" after EPA disapproves part of a SIP clearly allows EPA to issue a FIP concurrently with that disapproval.

3. ***City of Mukilteo v. U.S. Dep't of Tranp.***, 815 F.3d 632 (9th Cir. 2016). *Author*: Marianne Dugan, Attorney at Law.

Two cities, an environmental conservation group, and two individuals petitioned for review of an order of the Federal Aviation Administration (FAA), alleging violations of the National Environmental Policy Act (NEPA). The FAA had issued a finding of no significant impact (FONSI), determining that a full environmental impact statement (EIS) was not necessary for approval of passenger airline service at a small commercial airport.

As in prior NEPA cases, the court rejected what it perceived as an attempted battle of experts and deferred to the FAA's demand-based projections as to the number of air carriers that would end up operating at airport. The court held that this was in the agency's area of expertise and was a factual rather than legal inquiry. The court also noted that despite many years of litigation and a chance to provide information, the petitioners had not presented solid evidence to challenge these projections.

Similarly, the court rejected the argument that the FAA had failed to comply with NEPA's requirement that government agencies address "connected actions." The court held that it was only speculation that approval of passenger service would lead to even greater increased airport activity in the future.

The court also rejected petitioners' arguments that the FAA had demonstrated a bias towards approval of the proposed action. The court noted that NEPA not only allows, but requires, the agency to identify its preferred alternative and to set time limits; therefore it was acceptable for the FAA to give the contractor doing the NEPA analysis a date on which the FONSI could issue. It was also proper for the FAA to advocate for the proposal, because its enabling legislation includes an express congressional directive that the agency should promote and encourage development of commercial aviation throughout the United States. The court noted that NEPA requires agencies to conduct the environmental review objectively and in good faith, rather than as a subterfuge to rationalize a decision already made. Without analysis, the court held that the FAA had conducted a "careful and thorough" review of the final environmental analysis before issuing its decision.

The court rejected petitioners' argument that supplemental NEPA analysis was required due to changes in the proposal, as the changes were minor – a) a private entity stepping forward to pay for construction; and b) a potential change to which specific airlines would operate at the airport. The court noted that the addition of new airlines would likely trigger more NEPA because amendments would be required to those airlines FAA specifications. The court specifically noted that dismissal was without prejudice to the petitioners to challenge such future actions in a future lawsuit.

4. ***Idaho Wool Growers Ass'n v. Vilsack***, No. 14-35445, 2016 WL 805683, --- F.3d --- (9th Cir. Mar. 2, 2016). *Author*: Oliver Stiefel of Crag Law Center.

After concluding there is a significant risk of fatal disease transmission to the small and insular bighorn sheep populations in Idaho's Payette National Forest, the U.S. Forest Service decided to close domestic sheep grazing on approximately 70% of the allotments on which grazing had been permitted. The Idaho Wool Growers Association and others challenged the decision, objecting to the Forest Service's (1) failure to consult the Agricultural Research Service ("ARS") before preparing the Final Supplemental Environmental Impact Statement ("FSEIS") and Record of Decision ("ROD"); (2) failure to supplement the FSEIS and ROD in light of the publication of a 2010 study on the transmission of disease from domestic to bighorn sheep (the "Lawrence Study"); and (3) the choice and use of particular models to evaluate the risk of contact and the effects of disease transmission between domestic and bighorn sheep. In a unanimous opinion authored by Judge Berzon, the Ninth Circuit held that the Forest Service committed no reversible error.

Under the National Environmental Policy Act ("NEPA"), a federal agency conducing environmental review must consult with certain other agencies which have jurisdiction by law or special expertise with respect to any environmental impact involved in the proposed action. 42 U.S.C. § 4332(2)(C). The Ninth Circuit concluded that the Forest Service may have had the duty to consult with ARS—an agency with authority to conduct research concerning domestic animals and the causes of contagious, infectious, and communicable diseases. The Forest Service argued

that it had no duty to consult with ARS because that agency has no expertise in wildlife management. The Ninth Circuit noted that the Forest Service's interpretation of its duty to consult may be too narrow, given the expansive language establishing NEPA's consultation requirement.

Nevertheless, the court did not resolve the issue because any violation of the consultation duty was harmless. Specifically, Wool Growers contended that, had ARS been consulted, the agency and its research scientist Dr. Knowles would have conveyed to the Forest Service information regarding the uncertainties of disease transmission dynamics from domestic sheep. The court was unpersuaded, finding that such information had been amply communicated, and the Forest Service and the public had already considered it. Because the failure to consult did not materially impede NEPA's goals, any error was harmless.

The Ninth Circuit also held that the Forest Service did not act arbitrarily or capriciously or abuse its discretion by declining to supplement the FSEIS. The Court explained that supplementation is not required where the agency determines that new information is not significantly different from that already considered. Here, the FSEIS had cited and discussed the Lawrence Study (in unpublished form), and it had bolstered the Forest Service's decision. According to the Court, it was reasonable for the agency to determine that the publication of the Lawrence Study in essentially the form relied upon in the FSEIS did not provide significant information not already considered.

On the final claim, the Ninth Circuit upheld the Forest Service's choice and use of various models. The Court noted that the Forest Service used top-rate model designers, relied on peer-reviewed methodologies applied by other bighorn researchers, and incorporated on-the-ground data of bighorn sheep movements within the Payette. Given the deference owed to an agency when undertaking technical analysis within its purview, the fact that the models were used for appropriate purposes, because the models were grounded in scientifically acceptable methodologies, and because the Forest Service appropriately addressed uncertainties inherent in estimating contact and disease transmission, the agency's choice and use of the models satisfied NEPA.

5. ***San Diego Navy Broadway Complex Coal. v. U.S. Dep't of Def.***, No. 12-57234, 2016 WL 1237404, --- F.3d --- (9th Cir. Mar. 30, 2016). *Authors*: Marc R. Bruner of Perkins Coie LLP.

The U.S. Court of Appeals for the Ninth Circuit rejected a claim under the National Environmental Policy Act that the Navy did not adequately consider the environmental consequences of a potential terrorist threat with respect to the redevelopment of a military complex near downtown San Diego. The opinion upheld the Navy's Environmental Assessment, which concluded that the project would not create the potential for a significant impact from a terrorist attack.

The Navy first approved the redevelopment of the complex in 1991. The project included both military functions and private commercial uses to generate revenue. But adverse real estate conditions in San Diego delayed the project until the mid-2000s. In 2006, the Navy prepared an EA for the project to supplement its prior NEPA analysis from the early 1990s, and

it executed a lease with a private development partner. But a citizens group filed a NEPA lawsuit, and the district court ruled that the Navy failed to provide adequate public notice for the EA.

In response, the Navy prepared a new EA and reapproved the project in 2009. The new EA included a discussion of a potential terrorist attack, due to the Ninth Circuit's prior ruling in San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission, 449 F.3d 1016 (9th Cir. 2006), which had held that a categorical dismissal of the potential impacts from a terrorist attack at an installation built to store spent nuclear fuel rods was unreasonable under NEPA. The Navy's new EA concluded that a terrorist attack at the complex in San Diego was too speculative and remote to require NEPA analysis, since there was no known specific threat targeting the complex or its location. The EA also explained that anti-terrorism building specifications would be followed to reduce the risks posed by a potential terrorist attack. The EA thus concluded that the project would not place military or civilian personnel in jeopardy and would not result in a significant impact under NEPA. The citizens group sued again to challenge the project.

The court upheld the discussion in the EA, although it rejected the Navy's threshold claim that no analysis of a terrorist threat should be required under NEPA. The Navy argued that the new complex would consist merely of "everyday facilities," in contrast to the nuclear fuel storage facility at issue in the Mothers for Peace case. But the court emphasized that the complex would house military command personnel and would be located in a heavily populated urban area. The court thus concluded that the Navy was required to consider the potential for a terrorist attack, given the general risk of terrorism, the project's location, and its military functions.

The court also faulted the Navy for its reasoning that "no known specific threat of a terrorist attack" existed. As the court explained: "The risks associated with terrorism are constantly in flux, and whether or not the intelligence community is aware of a specific threat to a facility at the time a NEPA analysis is conducted should have no bearing on whether to consider the impacts of an attack." Nevertheless, the court found it was sufficient that the EA referred to its anti-terrorism building specifications, which are designed to address a range of terrorist attack scenarios, including explosives, fire and chemical, biological and radiological weapons.

B. District of Oregon

1. ***Bark v. Northrop***, No. 3:13-CV-00828-AA, 2016 WL 1181672 (D. Or. Mar. 25, 2016). *Author*: Marla Nelson of WildEarth Guardians.

This case involved a challenge to United States Forest Service and National Marine Fisheries Service (NMFS) decisions authorizing RLK and Company's (RLK) proposal for the Timberline Ski Area Mountain Bike Trails and Skills Park on Mt. Hood in Mt. Hood National Forest. RLK proposed to build seventeen miles of bike trails, a small skills park, and complete 2.1 miles of restoration work. In 2012, the Forest Service released an environmental assessment (EA) analyzing the impacts of the chairlift-assisted mountain bike park and approved the project in a Finding of No Significant Impact (FONSI) and Decision Notice (DN). NMFS issued a Biological Opinion (BiOp) and Incidental Take Statement (ITS) assessing the project's effects on

the Lower Columbia River Steelhead, listed as threatened under the Endangered Species Act (ESA).

In 2013, plaintiffs Bark, Friends of Mount Hood, Northwest Environmental Defense Center, and Sierra Club filed a complaint alleging the Forest Service and NMFS violated the National Environmental Policy Act (NEPA), National Forest Management Act (NFMA), and ESA. RLK intervened as a defendant. The district court denied the plaintiffs' motion for summary judgment and granted the Forest Service's and RLK's cross-motions for summary judgment on the plaintiffs' NEPA claims that the Forest Service failed to prepare an EIS for the project and failed to conduct NEPA analysis when it accepted an update to RLK's Master Development Plan (MDP), and on plaintiffs' NFMA claims.

First, the court held the Forest Service did not need to analyze updates to RLK's MDP pursuant to NEPA because acceptance of the MDP was not final agency action and, other than the mountain bike park, none of the projects identified in the MDP were reasonably foreseeable. Second, the court determined the Forest Service's decision to forgo an EIS was not arbitrary and capricious. It deferred to the agency's conclusion that potential sediment increases were not highly controversial or highly uncertain. As for impacts to Lower Columbia River steelhead, the court held the Forest Service reasonably concluded that although the project may have some impacts on individual fish and a small amount of habitat, it would not result in significant impacts to the population. Finally, the court concluded the Forest Service did not violate NFMA or the National Forest Plan Aquatic Conservation Strategy Riparian Reserve Standards and Guidelines.

Following oral argument, NMFS and the Forest Service reinitiated consultation under the ESA to assess the project's effects on the Lower Columbia River Steelhead because the Forest Service had exceeded the terms of its ITS when implementing the restoration activities. In light of the ongoing analysis, the court stayed the parties' motions on plaintiffs' NEPA claim alleging the Forest Service should have conducted supplemental NEPA analysis, and plaintiffs' ESA claims.

2. ***Bohmker v. State***, No. 1:15-CV-01975-CL, 2016 WL 1248729, --- F. Supp. 3d --- (D. Or. Mar. 25, 2016). *Author*: Chris Thomas of The Freshwater Trust.

This lawsuit arose in response to Senate Bill 838. Passed in 2013, SB 838 establishes a temporary moratorium on motorized mining activities within the bed and banks of certain fish-bearing waterways to protect environmental and cultural resources. The law also limits the number of otherwise allowable mining operations. These restrictions effectively prohibit motorized instream mining activities in many gold-bearing streams throughout Oregon. In response to this prohibition, a coalition of individual miners, mining groups, and mining-related business sued the state to prevent the law's implementation. The mining plaintiffs requested declaratory relief, arguing that the Mining Act of 1872, the Multiple Use Act of 1955, and federal mining regulations preempt SB 838.

After concluding the plaintiffs had standing, Judge Clarke held that federal law does not expressly preempt, occupy the field, or conflict with state law sufficiently to result in constitutional preemption. Supreme Court precedent holds that federal mining laws fail to

preempt "reasonable state environmental laws" even if state law has the effect of restricting mining activities on federal land. Based on this precedent, the court found that no preemption exists. Judge Clarke determined that SB 838 qualifies as a reasonable state environmental law as it does not prohibit all mining activities. Rather, it only prohibits specific types of mining activities in specific areas. Furthermore, SB 838 is not a land use law because it does not mandate particular land uses.

Lastly, the plaintiffs argued the court should follow recent case law from the California Court of Appeals and adopt a "commercially impracticable" standard to guide the preemption analysis. In light of the California Supreme Court's pending review of that decision and the federal government's opposition to such a consideration in its amicus brief, the court agreed that nothing makes practicability a preemption consideration. Thus, despite the long history of mining in Oregon, the court found nothing to prevent a temporary ban on motorized instream mining intended to protect water quality and fish habitat.

3. ***McKenzie Flyfishers v. McIntosh***, No. 6:13-CV-02125-TC, 2016 WL 446880, --- F. Supp. 3d --- (D. Or. Jan. 22, 2016). *Author*: Cody Gregg of Willamette Law.

Plaintiffs McKenzie Flyfishers and Steamboaters brought suit against the Army Corp of Engineers (the "Corps") and Bruce McIntosh of the Oregon Department of Fish and Wildlife alleging violations of the ESA in their operation of the McKenzie Hatchery and Cougar Dam which resulted in adverse effects on wild spring Chinook salmon. The plaintiffs and the Corps entered into a Consent Decree dismissing all claims against the Corps and providing for reasonable attorneys' fees and costs under ESA § 11. The parties proceeded to negotiations over attorneys' fees and costs and on August, 28, 2015, the plaintiffs filed a motion seeking $215,586.83 in fees and costs. The Corps responded arguing that the plaintiffs filed the motion in violation of Local Rule 7-1, that the attorneys' fees sought were excessive and included fees for tasks performed for which there could be no recovery. The Corps also disputed the fees sought in relation to expert testimony and disputed costs for lack of sufficient documentation.

In relation to attorney's fees sought, the court held that while the OSB Economic Survey on prevailing rates for Oregon forums should be afforded significant weight, because the Economic Survey only considers years of experience the survey is not dispositive. The court held that each attorney's reputation, experience, as well as the rates of attorneys of an ability and reputation comparable to that of the prevailing counsel in determining reasonable fees. The court deducted ten percent of hours spent by lead council on the instant motion for violations of Local Rule 1-7 to which he had admitted. The court also deducted hours for duplicative expenditures, clerical tasks, time not sufficiently connected to litigation, and block billed time.

The Corps argued that work performed in the course of litigation by the attorneys and experts after the date they notified plaintiffs of the Corps approval of the Consent Decree should not be recoverable. The court disagreed holding that fees were recoverable up until the time of the courts approval of the Consent Decree. The court, however, found that the plaintiffs had insufficiently documented costs as relating to litigation. The court also found that the plaintiffs attempt to request a reduction of 25 percent of costs in lieu of time spent documenting each and every expenditure was inappropriate. No award for costs were given.

C. Federal Administrative Rules

1. U.S. Fish and Wildlife Service Updates Native American Tribe Policy, 81 Fed. Reg. 4638 (Jan. 27, 2016). *Authors*: Donald Baur, Jena A. MacLean, Odin Alonso Smith, and Stephanie M. Regenold of Perkins Coie LLP.

The U.S. Fish and Wildlife Service announced an updated Native American policy on January 27, 2016, which provides a framework for government-to-government relationships to further the federal government's trust responsibility to federally recognized tribes to protect, conserve and use tribal resources. 81 Fed. Reg. 4638 (Jan. 27, 2016). This policy comes after two and a half years of collaboration and discussions between the Service and tribal representatives.

The policy recognizes the need for strong, healthy communication and relationships between the Service and tribal governments to improve conservation of fish and wildlife resources and enhance shared natural and cultural resource goals and objectives. It replaces the 1994 policy included in the U.S. Fish and Wildlife Service Manual. As a result, the policy reflects both a framework and aspirational guidance concerning recognition of tribal sovereign status, Service responsibilities, and opportunities for the Service and tribes to work together toward natural and cultural resource conservation and access.

The policy includes guidance on the following:

- The unique relationship between the Service and federally recognized tribes and Alaska Native Claims Settlement Act corporations, including Service employee responsibilities.
- Tribes' sovereign authority over their members and territory and the right to self-govern.
- Government-to-government relations, communication, consultation and information sharing by working collaboratively and in accordance with existing initiatives, agreements and the Department of Interior's November 2015 Policy on Consultation with Indian Tribes and Alaska Native Corporations.
- Co-management and collaborative management opportunities where the Service, tribes, Alaska Native Organizations and others have shared responsibility. Examples include resource co-management of the salmon harvest in the Pacific Northwest, the Alaska Migratory Bird Co-Management Council cooperatively setting subsistence harvest regulations, lake trout fisheries in the Great Lakes and cooperative agreements in Alaska to conserve marine mammals and to provide co-management of subsistence use by Alaska Natives.
- Tribal access to Service lands and Service-managed resources for cultural and religious practices. Under the policy, the Service should (1) avoid adversely affecting the physical integrity of sacred sites while managing its lands; (2) accommodate and, as needed, collaborate with tribal governments for access to and maintenance of appropriate settings for ceremonial use of Indian sacred sites; and (3) consider tribal government protocols and procedures to give their members access to and use of cultural resources.

- Tribal cultural use of plants and animals and collaboration on these issues in accordance with the 1997 Department of the Interior Order No. 3206 on tribal rights and federal trust responsibilities under the Endangered Species Act, as well as other under other laws.

- Tribal Law enforcement responsibilities and encouragement for cooperative law enforcement between the Service and tribes for managing Indian lands and tribal resources.

- Mandatory consideration of excluding tribal lands from areas designated as critical habitat under the Endangered Species Act.

- Cross training and education between tribal governments and the Service to train Service employees and make Service technical experts available to help tribes develop technical expertise, support tribal self-determination and support Native American professional development, including the Indian Self-Determination and Education Assistance Act.

Although the policy is effective, the Service maintains flexibility for Service Regions to work with tribes and Alaska Native Corporations to allow for local and regional differences. Further, the Service emphasizes that "[t]his policy is not meant to stand on its own," but to effectively implement it, the Service further intends on updating its *U.S. Fish and Wildlife Service Tribal Consultation Handbook*, establish an Alaska Regional Native American policy and develop training so that Service employees will be better able to perform duties related to this policy.

2. Proposed Revisions to the U.S. Fish and Wildlife Service Mitigation Policy, 81 Fed. Reg. 12380 (Mar. 8, 2016) (Proposed Revisions). *Authors*: Donald Baur, Robert A. Maynard, Laura Godfrey Zagar of Perkins Coie LLP.

The U.S. Fish and Wildlife Service (FWS) published draft revisions on March 8, 2016 to its 1981 Mitigation Policy for mitigating the impacts of development projects to natural resources. The Proposed Revisions come in the wake of President Obama's November 3, 2015 Presidential Memorandum on federal mitigation policies. The Proposed Revisions purportedly implement the president's direction in the Memorandum as it pertains to the FWS while also comporting with the U.S. Secretary of the Interior's Order No. 3330 titled "Improving Mitigation Policies and Practices of the Department of the Interior," issued October 31, 2013 and the Departmental Manual Chapter on implementing Mitigation at the Landscape-Scale, issued October 23, 2015.

The FWS has explained that the Proposed Revisions are intended to broaden the scope of the mitigation policy to address all resources over which the FWS has the authority to recommend mitigation and to provide an updated framework for applying mitigation measures to maximize their effectiveness. In addition to responding to the Memorandum, developments in threats to resources, advancements in conservation science and changes in the context of resource conservation motivated the development of the Proposed Revisions. Specifically, the FWS notes accelerated loss of habitat due to land use changes, the effects of climate change, the development of adaptive management as the preferred science-based conservation approach, and the increased focus on conservation at appropriate landscape scales rather than specific habitats as prompts for the Proposed Revisions.

Specific changes to the 1981 Mitigation Policy include all of the following:

- Incorporating all statutes and regulations—including the Endangered Species Act (ESA), not incorporated in the 1981 Mitigation Policy—that provide the FWS with authority to require or recommend mitigation
- Establishing guiding principles for mitigation across all FWS programs
- Establishing a landscape-based, regional approach to mitigation

The FWS states in the announcement of the Proposed Revisions that it intends to develop program-specific policies and guidance to effectuate the intent of the Proposed Revisions. Specifically, the FWS states that it anticipates publishing a policy for compensatory mitigation under the ESA to provide operational detail for implementing the Proposed Revisions.

The actual effect of the Proposed Revisions, and any additional program-specific policies that the FWS may promulgate, remains to be seen. The Proposed Revisions' explicit reference to the ESA and focus on landscape-scale mitigation will likely promote the growing trend of far-reaching conservation efforts. This will likely impact the scope and scale of future development projects. The extent to which the Proposed Revisions comport with policies that other federal agencies have implemented, or will implement, to comply with the Memorandum—and the resulting extent to which federal agencies take a common approach to mitigating the impacts of development on resources—will become clear as policies are fully developed and, more importantly, implemented.

The FWS will accept comments to the Proposed Revisions until May 9, 2016.