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Recent Environmental Cases and Rules

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Matthew Preusch, Editor October
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Editor's Note: This issue contains selected summaries of cases issued in July, August, and September of 2014. 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 Marianne Dugan for her summary of Gifford Pinchot Task Force v. Perez et al. If you are interested in summarizing cases and rules, please contact me.

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CASES

9th Circuit Court of Appeals

- ***United States v. FRC***, No. 12-36065, ___ F.3d ___ (9th Cir. Sep. 16, 2014)
- ***MEIC v. Stone-Manning***, No. 13-35107, ___ F.3d ___ (9th Cir. Sep. 11, 2014)
- ***Alaska Cmty. Action v. Aurora***, No. 13-35709, ___ F.3d ___ (9th Cir. Sep. 3, 2014)
- ***Ctr. for Cmty. Action v. BNSF***, No. 12-56086, ___ F.3d ___ (9th Cir. Aug. 20, 2014)
- ***Sierra Club v. U.S. EPA***, Nos. 11-73342; 11-73356, ___ F.3d ___ (9th Cir, Aug. 12, 2014)
- ***Columbia Riverkeeper v. U.S. Coast Guard***, No. 12-73385, ___ F.3d ___ (9th Cir., Aug. 5, 2014)
- ***Arizona v. Reytheon Co.***, No. 12-15691, ___ F.3d ___ (9th Cir. Aug 1, 2014)
- ***People of the State of Cal. v. U.S. Dept. of Interior***, No. 12-55956, ___ F.3d ___ (9th Cir. Aug 1, 2014)
- ***United States v. Parker***, No. 13-30157, ___ F.3d ___ (9th Cir. July 31, 2014)

District of Oregon

- ***Gifford Pinchot Task Force v. Perez***, No. 03:13-cv-00810-HZ (D. Or. July 3, 2014)

Oregon Supreme Court

- ***Sea River Properties, LLC v. Parks***, No. S061094, ___ Or. ___, (Aug 14, 2014)

9th Circuit Court of Appeals

United States v. FRC, No. 12-36065, ___ F.3d ___ (9th Cir. Sep. 16, 2014), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2014/09/16/12-36065.pdf
Adam Paczkowski, Willamette Law Online

The United States filed suit in 2011 against the Federal Resources Corporation (FRC) and the Coeur d'Alenes Company (CDA) and other potentially responsible parties in order to recover the costs of cleaning up hazardous waste at the Conjecture Mine Site in Bonner County, Idaho. The United States entered into a settlement under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), with CDA for an amount less than CDA's share of the cleanup costs due to CDA's limited ability to pay through a consent decree.

FRC objected to this settlement due to the possibility of the CDA settlement increasing their liability to pay costs; however, the district court approved the settlement. On appeal, the Ninth Circuit held that the district court was not required to conduct comparative fault analysis prior to approving the consent decree nor was it improper in finding that the United States conducted an adequate investigation into CDA's ability to pay. Even though a settlement under CERCLA may cause another primarily responsible party to become disproportionately liable, a court will not be found to have abused its discretion in not conducting a comparative fault analysis.

MEIC v. Stone-Manning, No. 13-35107, ___ F.3d ___ (9th Cir. Sep. 11, 2014), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2014/09/11/13-35107.pdf.
Jacalyn Boyle, Willamette Law Online

Plaintiffs, Montana Environmental Information Center and the Sierra Club (collectively, "MEIC") brought suit against Tracy Stone-Manning, Director of the Montana Department of Environmental Quality, for injunctive relief to prevent Stone-Manning from approving a pending application for surface coal mining. MEIC relied on a provision in the Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C §§1201-1328, which requires a cumulative hydrologic impact assessment before an application for surface coal mining is approved.

The district court granted Stone-Manning's motion to dismiss for lack of subject matter jurisdiction. The Ninth Circuit upheld the district court ruling on standing because plaintiffs were unable to show an "actual" injury. MEIC alleged that Stone-Manning and her predecessors approved applications in the past without a hydrologic assessment, but MEIC did not show this made the pending application more likely to be approved. While imminent injury exists if there is a substantial risk of injury, the court held that plaintiffs could not show a substantial risk that the pending application would be approved.

For similar reasons, the panel agreed with the district court that plaintiffs' claim was not ripe. Because the alleged injury might never materialize, there was not yet a case. The panel rejected MEIC's attempt to invoke the firm prediction rule. The firm prediction rule has been applied in the 9th Circuit, but it did not apply in this case because the plaintiffs were unable to show that the application being approved was "inevitable" or that it was "nearly certain" to occur.

Alaska Cmty. Action v. Aurora, No. 13-35709, ___ F.3d ___ (9th Cir. Sep. 3, 2014), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2014/09/03/13-35709.pdf
Danielle Ross, Willamette Law Online

The Clean Water Act prohibits entities from releasing pollutants into navigable waters unless the entity has a permit under the National Pollutant Discharge Elimination System. An entity may acquire either an individual permit, which authorizes it to dump pollutants in a specific place, or a general permit, which allows entire classes of dischargers to dump in a geographical region.

In this case, Aurora Energy Services, LLC, and Alaska Railroad Corp. ("defendants"), own and operate Seward Coal Loading Facility, which receives coal and subsequently transfers it onto ships. During this process, some of the coal is discharged into the bay. Defendants believed that a Multi-Sector General Permit ("General Permit") covered their actions. Alaska Community Action on Toxics and the Alaska Chapter of the Sierra Club ("plaintiffs") disagreed, and brought suit against the defendants.

Following the district court's grant of summary judgment to the defendants, the plaintiffs appealed. The Ninth Circuit held that general permits are issued following administrative rulemaking procedures, and should be "construed to give effect to the natural and plain meaning of [their] words." General Permits authorize an exclusive list of allowable non-stormwater discharges, and coal discharges are not included in that list. Because defendants' discharges of coal were prohibited by the plain terms of General Permits, the panel determined that the district erred in granting summary judgment to defendants and reversed that order.

Ctr. for Cmty. Action v. BNSF, No. 12-56086, ___ F.3d ___ (9th Cir. Aug. 20, 2014), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2014/08/20/12-56086.pdf
Rianna Venn, Willamette Law Online

The Center for Community Action appealed the district court's dismissal of its complaint under the citizen-suit provision of the Resource Conservation and Recovery Act ("RCRA"). The Center had sued Burlington Northern Santa Fe Railway Company ("BNSF") and Union Pacific Railroad Company alleging that their respective rail yards had "various locomotive, truck, and other heavy-duty vehicle engines [that] emit tons of diesel particulate matter—small, solid particles found in diesel exhaust—into the air" that then contaminate land and water, and are therefore in violation of RCRA. Diesel particulate matter is known to be a "toxic air contaminant" that poses serious health and environmental risks.

BNSF argued that Center failed to state a claim under RCRA and moved for dismissal. The district court granted the motion to dismiss, stating that the Clean Air Act covered the activity complained of by the Center, and that "any 'gap' that might exist between the two statutory schemes" was created purposely by Congress and the Environmental Protection Agency.

On appeal, the Ninth Circuit reviewed whether under RCRA's citizen-suit provision, the Center had plausibly alleged that BNSF "[has] contributed or [is] contributing to 'the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.'" The panel determined based on the context of the statute, and its statutory and legislative

histories, that the emission of diesel particulate matter is not within the scope of the definition of "disposal." The panel therefore affirm the district's court's ruling that the Center "fail[ed] to state a plausible claim for relief" under RCRA's citizen-suit provision.

Sierra Club v. U.S. EPA, Nos. 11-73342; 11-73356, ___ F.3d ___ (9th Cir, Aug. 12, 2014), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2014/08/12/11-73342.pdf
Tucker Kraght, Willamette Law Online

Avenal Power Center LLC ("Avenal") applied for a permit with the United States Environmental Protection Agency ("EPA") to build a power plant in Avenal, California. Before the EPA granted or denied the application, the EPA tightened its air quality control standards. Avenal petitioned to be granted a permit under the previously applicable standards, because the EPA was required to grant or deny the application within one year and did not. The EPA initially refused, but later reversed, granting Avenal a permit under the previous standards.

The Sierra Club, among others, challenged the EPA's action. EPA argued that its application of its permitting rules was entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* The Ninth Circuit disagreed, holding that the Clean Air Act required Avenal to demonstrate that the Avenal Energy Project complied with regulations in effect at the time the permit was issued. The panel also held that because Congress had spoken to the precise question at issue, the EPA could not waive this requirement.

Columbia Riverkeeper v. U.S. Coast Guard, No. 12-73385, ___ F.3d ___ (9th Cir., Aug. 5, 2014), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2014/08/05/12-73385.pdf
Tucker Kraght, Willamette Law Online

Columbia Riverkeeper, Columbia-Pacific Common Sense, and Wahkiakum Friends of the River ("Riverkeeper") attempted to intervene in an effort to prevent LNG Development Company, LLC ("LNG"), from constructing a liquefied natural gas facility and pipeline along the Columbia River in Oregon. The United States Coast Guard provided the Federal Energy Regulatory Commission ("FERC") with a "letter of recommendation regarding the suitability of the waterway for vessel traffic associated with the proposed facility."

Riverkeeper petitioned the Ninth Circuit for review of the Coast Guard's issuance of that letter. The Ninth Circuit held that the plain language of the Natural Gas Act permits judicial "review [of] final agency actions or orders, issuing, conditioning or denying an agency determination that has the legal effect of granting or denying permission to take some action" but because Riverkeeper did not establish that that the Coast Guard's letter of recommendation was a final agency order or action to issue a permit the Court lacked jurisdiction to consider it.

Arizona v. Reytheon Co., No. 12-15691, ___ F.3d ___ (9th Cir. Aug 1, 2014), *available at* http://willamette.edu/wucl/resources/journals/wlo/9thcir/2014/08/arizona-v.-reytheon-co..html
Anastasiya Krotoff, Willamette Law Online

The State of Arizona ("State") brought suit under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") and the Arizona Water Quality Assurance Revolving Funds ("WQARF") for the cleanup of a contaminated landfill site in Tucson, Arizona. In June 2010, the State settled with twenty-two potentially responsible parties,

thereby releasing them from liability and contributory obligations of future non-settling parties. Several non-settling parties not included in the settlement negotiations ("Intervenors") intervened in the action, opposing the State's motion to include consent decrees, and alleging that the State failed to provide information regarding whether the consent decrees were in congruence with CERCLA objectives. The district court denied the Intervenor's request for declaratory relief and entered the consent decrees.

On appeal, the Ninth Circuit Court held that that the Intervenors' request for declaratory relief was improperly before the district court because such relief must be included in the original complaint. Secondly, the panel held that the district court failed to independently scrutinize the consent decrees pursuant to CERCLA and incorrectly deferred to the determinations of the Arizona Department of Environmental Quality. A consent decree pursuant to CERCLA may be granted if a settlement agreement is "fair, reasonable, and consistent with CERCLA's objectives," whereby the district court must use comparative analysis to estimate the harm by each potentially responsible party.

People of the State of Cal. v. U.S. Dept. of Interior, No. 12-55956, ___ F.3d ___ (9th Cir. Aug 1, 2014), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2014/08/01/12-55856.pdf
Nicole Morrow, Willamette Law Online

The Secretary of Interior prepared an environmental impact statement ("EIS") concerning California's Salton Sea and its continued access to Colorado River water, and then implemented a new water delivery schedule. Imperial County and the Imperial County Air Pollution Control District sued the Secretary asserting that the EIS did not comply with the National Environmental Policy Act ("NEPA") or the Clean Air Act ("CAA"). The district court originally granted summary judgment in favor of the defendants, holding that plaintiffs lacked Article III standing, and also rejected their NEPA claim on its merits.

On appeal, the Ninth Circuit first reviewed for standing, noting that the plaintiffs had established Article III standing by plainly alleging (1) that the Secretary violated procedural rules, (2) NEPA and CAA were designed to protect the plaintiffs' interests, and (3) the challenged action threatens the plaintiffs' concrete interests. As to the NEPA claims, the panel noted that they must defer to the "informed discretion of the responsible federal agencies." The panel went on to hold that although the Secretary once cited the Implementation Agreement EIS and Transfer EIS as a single document in her district court briefing, that minor misstatement does not prejudice the panel's review. The panel used an "independent utility" test to determine whether each of the two projects would have taken place without the other, thus having independent utilities. They determined that the Transfer EIS considered a separate water-transfer agreement among the districts and proposed habitat conservation programs while the Implementation Agreement EIS analyzed the on river effects of altering the Colorado River diversion points. The Secretary did not abuse her discretion by concluding that a supplemental EIS was unnecessary. A supplemental EIS is unnecessary when an agency's final decision falls "within the range of alternatives" considered in an EIS.

United States v. Parker, No. 13-30157, ___ F.3d ___ (9th Cir. July 31, 2014), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2014/07/31/13-30157.pdf
Brodia Minter, Willamette Law Online

In two separate instances Officer Steve Roberson stopped Shawn Parker, a commercial

snowmobile operator, for operating snowmobiles in violation of U.S. Forest Service Regulations. At a bench trial before a magistrate judge, Parker was found guilty of two misdemeanor counts of "conducting any kind of work activity or service" and one misdemeanor count of threatening, resisting, intimidating, or interfering with a Forest Service officer.

Parker appealed, arguing that his actions did not take place on Forest Service land, but instead on Salmon la Sac road, a county road subject to easement, that is explicitly exempt from Forest Service regulations under 36 C.F.R. Part 261. On appeal the panel affirmed the convictions. In affirming the decision the panel held that even though the actions took place on a county road subject to easement the activities in question both took place "in the National Forest System" and "affect[ed], threaten[ed], or endanger[ed]" National Forest land.

District of Oregon

Gifford Pinchot Task Force v. Perez, No. 03:13-cv-00810-HZ (D. Or., July 3, 2014)
Marianne Dugan, Attorney at Law, www.mdugan.com

The Gifford Pinchot Task Force (Task Force) successfully challenged the U.S. Forest Service (USFS) and the Bureau of Land Management (BLM) for their decisions approving hardrock mineral exploration in the Goat Mountain/Green River area just north of the Mount St. Helens National Volcanic Monument. In his July 3 opinion, Judge Marco Hernandez ruled for the Task Force on most of its claims, rejecting the defendants' procedural arguments, but ruling for the defendants in part on the Task Force's National Environmental Policy Act (NEPA) claims.

The court found the agencies' action unlawful in three primary ways. First, the agencies violated the Land & Water Conservation Fund (LWCF) Act and the Weeks Act, because they did not make a determination that the mining project would avoid interference with recreation. (Lands purchased with LWCF funds must be "primarily of value for outdoor recreation purposes." 43 U.S.C. § 1748. Under the Weeks Act of 1911, the Secretary of Agriculture must determine that any mineral development activities would not interfere with "the primary purposes for which the lands were acquired." 30 U.S.C. § 352(b)). Second, the mining project violated riparian protections established pursuant to National Forest Management Act. Third, the agencies violated NEPA by inadequately analyzing baseline groundwater status and cumulative impacts to groundwater; failing to provide detailed analysis of mitigation measures; and failing to consider all reasonable alternatives to the project. The court, however, rejected the Task Force's argument that the agencies' other analyses of the cumulative impacts of the project were inadequate.

Oregon Supreme Court

Sea River Properties, LLC v. Parks, No. S061094, ___ Or. ___, (Aug 14, 2014), *available at* http://www.publications.ojd.state.or.us/docs/S061094.pdf
Steven Mastanduno, Willamette Law Online

Parks owned a plot of land to the north of property held by Sea River Properties (Sea

River) in Tillamook County on the Nehalem River. Over the course of time, Parks' property, which originally bordered the ocean, eroded to the extent that it now borders a former channel of the river. Sediment accreted and land grew slowly until it covered the channel to the north, across from Parks' land. Sea River acted to quite title.

The trial court found the land was Sea River's because it began to accrete on his property, but that Parks had adversely possessed Sea River's land. The Court of Appeals affirmed. The Oregon Supreme Court reversed the findings of both the trial court and the Court of Appeals, holding the new land was first attached to Sea River's property, so titled passed to it. The Court further reversed the trial court's finding of adverse possession, holding that Parks' use of the land was not significant enough for adverse possession, despite having paid property taxes on the land for decades, which was a manifestation of ownership, but not use.