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Recent Environmental Cases and Rules

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Editor's Note: This issue contains selected summaries of cases issued in July, August, and September of 2017.

A special thank you to our talented contributors for their summaries: Olivia Schneider Grabacki of Miller, Nash, Graham & Dunn LLP., YoungWoo Joh, Multnomah County Court Judicial Clerk, Oliver Stiefel of the Crag Law Center, and Alexa Shasteen of Marten Law. If you are interested in summarizing cases or rules, please do not hesitate to contact me.

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District of Oregon Case

1. ***Campbell v. Oregon Dept. of State Lands***, No. 2:16-cv-01677-SU (D. Or. Aug. 4, 2017).

9th Circuit

1. ***Asarco LLC v. Atlantic Richfield Co***., No. 14-35723 (9th Cir. Aug. 10, 2017).
   Author: Olivia Schneider Grabacki of Miller, Nash, Graham & Dunn LLP.

Section 113(f)(3)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") grants a potentially responsible party ("PRP") that "resolved its liability to the United States government or a State" for cleanup actions 'in an administrative or judicially approved settlement" the right to bring a contribution action against non-settling PRPs for costs imposed in the settlement. 42 USC 9613(f)(3)(B). There is a three-year statute of limitations period for bringing a CERCLA § 113(f)(3)(B) contribution claim against a non-settling PRP. 42 USC 9613(g). For the first time, the Ninth Circuit addressed whether the "administrative or judicially approved settlement' must have been the result of an action brought under CERCLA and what it means for a PRP to 'resolve its liability" so that the statute of limitations for a contribution claim begins to run.

For nearly a century, a smelter located in Lewis and Clark County, Montana, released hazardous waste, which led the Environmental Protection Agency ("EPA") to add the site to the National Priorities List in 1984 and designate former operators Asarco LLC and Atlantic Richfield as potentially responsible parties for its cleanup. In 1998, Asarco settled its liability to the under the Resource Conservation and Recovery Act ("RCRA") in a judicially approved consent decree (the "RCRA Consent Decree"). This settlement imposed civil penalties and required Asarco to take corrective measures at the site. Asarco settled its CERCLA liability for releases at the same site with the State of Montana and the EPA in a judicially approved consent decree in 2009 (the "CERCLA Consent Decree"). Asarco then brought suit against Atlantic Richfield seeking contribution for the financial obligations imposed in the CERCLA Consent Decree. Atlantic Richfield argued that the three-year statute of limitations for contribution claims began to toll when Asarco settled its cleanup obligations under the RCRA Consent Decree, and thus Asarco's contribution claim was untimely. Asarco countered that a RCRA settlement cannot trigger CERCLA's statute of limitations. The U.S. District Court for the District of Montana granted summary judgment to Atlantic Richfield, concluding that 1) CERCLA § 113(f)(3)(B) requires only that a PRP settle with the United Statesor state regarding a response action and not necessarily a CERCLA-specific response action and 2) that the RCRA Consent Decree sufficiently resolved Asarco's liability so that the statute of limitations began to toll in 1998. *Asarco LLC v. Atlantic Richfield Co.*, 73 F Supp 3d 1285 (2014).

Recognizing that this question has split the circuits, the Ninth Circuit first considered whether a settlement agreement entered into under an authority other than CERCLA may give rise to a CERCLA contribution action. The Court compared the language in § 113(f)(3)(B) to the language in § 113(f)(1), which provides a distinct cost recovery claim against PRPs for directly incurred costs. Because § 113(f)(1) expressly states a PRP can only obtain cost recovery from another PRP "during or following any" CERCLA § 106 or § 107 action and § 113(f)(3)(B) omits any analogous qualifying language, the Ninth Circuit found there is no such requirement in §113(f)(3)(B). Accordingly, the Ninth Circuit held that a non-CERCLA settlement may create a right to a contribution claim under §113(f)(3)(B). The Court also found that the "corrective measures" imposed in the RCRA Consent Decree qualified as a "response" action under CERCLA so as to qualify the Decree as a §113(f)(3)(B) settlement.

Finally, the Ninth Circuit interpreted what it means for a party to "resolve its liability" in a settlement agreement. Atlantic Richfield argued, and the District Court agreed, that Asarco had fully resolved its liability to the government in the RCRA Consent Decree, thereby triggering the § 113(f)(3)(B) right to bring a contribution action in 1998. The Ninth Circuit looked to the commonly understood meaning of the word "resolve" and determined that the settlement must contain an element of finality while also determining the PRP's compliance obligations with certainty. The Court noted that a covenant not to sue with a reservation of rights to bring further legal action does not necessarily negate a resolution of liability. As applied to the RCRA Consent Decree, however, the Court held that because the Decree referenced Asarco's continued legal exposure and expressly preserved all of the United States' potential future enforcement options, it did not definitively settle any of Asarco's response obligations. In contrast, the Court found the CERCLA Consent decree did fully resolve Asarco's liability for all of its response costs at the site because the Decree expressly contained a binding covenant not to sue, protection against CERCLA contribution claims brought by third parties, and a cap on Asarco's financial

obligations. Thus, the Ninth Circuit held that while a non-CERCLA settlement can trigger the § 113(f)(3)(B) right to bring a contribution claim, the RCRA Consent Decree did not "resolve [Asarco's] liability" in 1998. Accordingly, the Ninth Circuit vacated the District Court's holding.

2. ***Center for Biological Diversity v. Zinke***, No. 14-17513 (9th Cir. Aug. 28, 2017). *Author:* Olivia Schneider Grabacki of Miller, Nash, Graham & Dunn LLP.

The Fish and Wildlife Service ("FWS"), the federal agency charged with implementing the Endangered Species Act ("ESA"), promulgated guidelines for determining whether a population segment is considered "distinct for purposes of the ESA. A distinct population segment ("DPS") is the smallest division of a species that can be listed as endangered or threatened under the ESA. The FWS guidelines require that such a population segment be both discrete and significant while also outlining several factors meant to aid the agency in making such a determination. In 2004, when the FWS was considering delisting the bald eagle, the Center for Biological Diversity and the Maricopa Audubon Society (collectively "CBD") petitioned FWS to list the desert eagle as a DPS of the bald eagle so that the desert eagle would be eligible to remain as a protected species under the ESA. The FWS determined the desert eagle was not a DPS. CBD appealed and the listing decision was litigated, appealed, and remanded back to FWS twice. In 2012, the FWS determined the desert eagle was not a DPS for the third time. CBD again challenged this decision and the District Court granted summary judgment in favor of FWS. CBD appealed up to the Ninth Circuit, which issued its decision in favor of the FWS on August 28, 2017.

CBD alleges that the FWS acted arbitrarily and capriciously in concluding that: (1) the desert eagle was not significant, even though FWS concluded that the desert eagle met one significance factor set out in the DPS guidelines, (2) a loss of the desert eagle population would not create a significant gap in the overall bald eagle population, and (3) that climate change would not significantly impact the desert eagle population.

The Ninth Circuit evaluated whether the FWS properly considered the relevant issues held in favor of the FWS. First, the Court reasoned that, because the significance requirement requires analysis of many different factors, the mere fact that the "persistence in its unusual or unique ecological setting" factor was met did not mean the FWS's finding to the contrary was arbitrary and capricious. The Court rejected CBD's argument that if a species satisfied one of the significance factors, the FWS must find the species to be "significant" for ESA purposes. Instead, the Court found the guidelines to be open-ended, expressly providing that the FWS should take specific factual circumstances into account and, in doing so, the agency is not limited to the factors listed in the ESA. Essentially, the Court reasoned that each factor was one of many to be weighed in the determination and the FWS properly engaged in extensive factual and scientific investigation regarding the desert eagle, which served as a basis for the determination that the desert eagle was not significant to, and thus not a DPS of, the bald eagle.

Next, the Ninth Circuit held that the FWS reasonably concluded that the desert eagle population, if lost, would not create a significant gap in the range of the taxon so as to be significant to the bald eagle population as a whole. CBD relied on a 2009 FWS report stating that the desert eagle

was significant as a peripheral population; a term the 2012 FWS determination did not include. The Ninth Circuit emphasized that agencies are permitted to change course and, so long as the change is based on sufficient evidence and reasoning, the agency's scientific decision is entitled to deference.

Finally, the Court rejected CBD's argument that the FWS failed to include climate change impacts in its 2012 decision. FWS directly acknowledged the uncertainty of climate change in its report, and determined, based on available data regarding the desert eagle's adaptability, that climate change would not be a significant impact on the desert eagle. The Court held that this determination was reasonable and thus not arbitrary and capricious.

3. ***Central Oregon Landwatch et al. v. Connaughton et al.***, No. 15-35089 (9th Cir. Aug, 23, 2017). *Author*: YoungWoo Joh, Multnomah County Court Judicial Clerk.

In this brief three-page opinion, the Ninth Circuit U.S. Court of Appeals gave a green light for the United States Forest Service to issue a Special Use Permit for the City of Bend's Bridge Creek Water Supply System Project, a project that would affect the diversion of water from Tumalo Creek. In the underlying suit, Plaintiff-Appellants Central Oregon LandWatch ("LandWatch") alleged that the Forest Services' permit was illegal because it violated the Federal Land Policy and Management Act ("FLPMA"), the National Forest Management Act ("NFMA"), and the National Environmental Policy Act ("NEPA"). The Ninth Circuit deferred heavily to the Forest Service's discretion and rejected each of LandWatch's arguments.

LandWatch's first claim for appeal argued that the City's project violated Inland Native Fish Strategy guidelines under the Deschutes National Forest Plan and, as a result, violated both FLPMA and NFMA. Specifically, LandWatch asserted that the project failed to "avoid effects that would retard or prevent attainment of the interim water temperature Riparian Management Objectives ("RMOs") established by INFISH." The Ninth Circuit deferred to the Forest Service's interpretation of RMOs as benchmarks, as well as the Forest Service's finding that the project would improve conditions in Tumalo Creek with minimal impact on particular parts of the creek.

Second, LandWatch appealed the District Court's ruling that the Forest Service performed an inadequate alternatives analysis, thereby violating NEPA. In rejecting LandWatch's arguments, the Ninth Circuit held that the Forest Service did not need to examine a true "no action" alternative; instead, the agency was only required to discuss "reasonable alternatives." The Court further held that LandWatch's proposed "no action" alternatives of no or reduced diversion were not "viable but unexamined alternatives" after having deferred to the Forest Service's discussion in its Environmental Assessment that such an alternative would "compromise the City's ability to provide a safe and reliable water supply" and could have possible environmental impacts such as reduced surface stream flows and increased energy consumption from pumping groundwater.

Finally, LandWatch argued on appeal that the Forest Service also performed an

inadequate analysis on the impact of climate change on the project and level of stream flows, which would also violate NEPA. Again, the Ninth Circuit rejected LandWatch's argument and held that the Forest Service qualitative approach was sufficient to constitute the required "hard look" to environmental impacts under NEPA, thereby agreeing with the Forest Service's assertion that "precise quantification was unreliable."

4. ***Wild Wilderness v. Allen*, No. 14-35505 (9th Cir. Sept. 8, 2017).** *Author:* Oliver Stiefel of Crag Law Center.

Plaintiffs Wild Wilderness et al. ("Wild Wilderness") challenged the U.S. Forest Service's ("Forest Service") Environmental Assessment ("EA"), Finding of No Significant Impact ("FONSI") and the Decision Notice ("DN") approving the Kapka Sno-Park in Central Oregon. The gravamen of Wild Wilderness' challenge was that the Forest Service failed to adequately address conflicts between two winter recreation groups: snowmobilers and backcountry skiers. The District of Oregon (Coffin, J.) granted summary judgment in favor of the Forest Service. Reviewing de novo, the Ninth Circuit affirmed the lower court's decision in a unanimous opinion authored by Judge Nguyen.

As a preliminary matter, the Ninth Circuit held that the case was not moot despite the completion of the Sno-Park, thereby rejecting an argument made by Intervenor-Appellees, Oregon State Snowmobile Association. The Court clarified that the question of mootness turns on whether *any* effective relief is available and, additionally, that the Court could order a new NEPA analysis or issue injunctive relief requiring closure of the Sno-Park or use only in the summer.

Next, the Ninth Circuit addressed Wild Wilderness' two claims under the National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1600 *et seq*., concluding that the approval of the project was consistent with the governing forest plan. On both claims, the Court found that the provisions of the forest plan on which Wild Wilderness relied were written in aspirational terms. According to the Court, the forest plan provisions set forth only non-binding guidance and created no legal obligations.

The Ninth Circuit also decided that the Forest Service did not violate the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq*., upholding the agency's decision over three NEPA challenges. First, the Court rejected Wild Wilderness' claim that the Forest Service violated NEPA by first issuing a draft Environmental Impact Statement ("EIS"), but then reversing course and issuing a final EA and FONSI in place of a final EIS. The Court explained that while the Forest Service was obligated to explain why an EIS was not necessary—as it did in the FONSI—there was no additional procedural requirement that the Forest Service explain why it changed its mind.

Second, the Court decided that the District Court correctly concluded the project at issue lacked "intensity" under Council for Environmental Quality regulations because the project was not likely to be highly controversial, did not threaten a violation of federal law, and did not pose significant cumulative effects. In short, the evidence marshaled by Wild Wilderness did not undermine the reasonableness of the Forest Service's conclusions.

Third, the Ninth Circuit held that the EA's purpose, need, and range of alternatives were not unreasonably narrow. The Court found that the purpose and need of providing safe parking was supported by the record. Although there were other issues that Wild Wilderness alleged should be addressed by the project—including on-snow user conflicts—the Court decided that the Forest Service was not obligated to attack every problem in a single action. Because the statement of purpose and need was not unreasonably narrow, the four alternatives considered in detail—the no action alternative, the proposed action, and two other action alternatives—were sufficient and the Forest Service was therefore not required to provide alternatives that more aggressively addressed on-snow user conflicts.

District of Oregon

1. ***Campbell v. Oregon Dept. of State Lands***, No. 2:16-cv-01677-SU (D. Or. Aug. 4, 2017). *Author*: Alexa Shasteen of Marten Law.

In Campbell v. Oregon Department of State Lands, 2017 WL 3367094 (D. Ore. 2017), plaintiffs filed a challenge to Oregon Senate Bill 838, which placed a temporary moratorium on motorized mining activities in certain designated salmon and bull trout habitat. Plaintiffs alleged SB 838 was preempted—and thus invalidated—by federal law, specifically the Supremacy and Property Clauses of the United States Constitution. On defendants' motion to dismiss, the United States District Court for the District of Oregon stayed the case pending the United States Court of Appeals for the Ninth Circuit's ruling in Bohmker v. Oregon, a different case in which SB 838 was alleged to be preempted by two federal statutes.

Oregon SB 838 placed a five-year moratorium on motorized precious metal mining in designated Oregon waters, including some waters located on federal land. The moratorium is set to last from January 2, 2016 through January 2, 2021, and applies to areas designated as "essential indigenous anadromous salmonid habitat" and/or containing "naturally reproducing populations of bull trout." SB 838 prohibits, in these designated areas, "motorized precious metal mining from placer deposits of riverbanks or riverbeds, and from other placer deposits, where mining would cause removal or disturbance of streamside vegetation and impact water quality." Such activities are prohibited "up to the 'line of ordinary high water,' and '100 yards upland perpendicular to the line of ordinary high water' located 'above the lowest extent of the spawning habitat' in a river containing an essential salmonid habitat or a reproducing bull trout population."

On July 27, 2016, plaintiffs Roy Campbell, Chad Marmolejo, Tommy Partee, and the Oregon Mining Association filed suit in Oregon state court against several state defendants, alleging SB 838 was preempted by federal law by the Supremacy and Property Clauses of the United States Constitution. Plaintiffs also requested an injunction to halt the enforcement of SB 838 pending the outcome of their case. Campbell, Marmolejo, and Partee are all miners who have federal

mining claims; they allege that it is not physically or financially feasible to make use of their mining claims without motorized equipment.

After removing the action to the United States District Court for the District of Oregon, defendants moved to dismiss plaintiffs' complaint for failure to state a claim. Instead, after ordering briefing on the question, the court decided to stay the case pending the United States Court of Appeals for the Ninth Circuit's ruling in Bohmker v. Oregon.

In Bohmker v. Oregon, plaintiffs challenged SB 838 as preempted by the federal Mining Law of 1872 and the federal Multiple Use Act of 1955. In Bohmker, the district court held SB 838 was not preempted by these federal laws. Plaintiffs appealed, and oral argument is set before the Ninth Circuit in November 2017, meaning a ruling can likely be expected in 2018.
The "Bohmker plaintiffs-appellants argue that SB 838's restriction on motorized mining on federal lands is preempted under conflict and field preemption principles." Conflict preemption can arise in a situation where federal and state laws conflict. Because federal law is supreme under the Supremacy Clause of the United States Constitution, where federal and state laws impose directly conflicting requirements, or it is impossible to comply with both, the federal law trumps the state law and thus the state law is preempted, or invalidated, pursuant to the doctrine of conflict preemption. Field preemption occurs where Congress has passed comprehensive federal legislation governing a particular topic or activity. Where Congress has passed comprehensive legislation intended to occupy a particular "field," state legislation in the same field is precluded by the doctrine of field preemption. The Bohmker plaintiffs-appellants assert these doctrines invalidate SB 838 because SB 838: (1) "contravenes the Mining Law's policy commitment to federal lands being 'free and open' for mining"; (2) "is not a reasonable permit system but a broad mining ban and a land-use statute"; and (3) "interferes with the 'accomplishment of the full purposes and objectives,' of federal mining law."

The court in Campbell decided to stay this second preemption challenge to SB 838 upon consideration of the required factors: "(1) potential prejudice to the parties from staying, (2) hardship and inequity to the parties from not staying, and (3) the judicial resources that would be saved by staying." The court concluded that, while the stay could cause some delay to plaintiffs' resumption of their motorized mining activities, the stay could actually "potentially save the parties significant time and effort" in proceeding with litigation and discovery, "all of which could prove wasteful depending on how the Ninth Circuit decides Bohmker." Further, the court found, "the interests of judicial economy very strongly favor staying this action pending a decision in Bohmker….Bohmker will almost certainly determine how [the] Court must decide defendants' Motion to Dismiss, and could well dispose of th[e] entire matter."

SB 838's temporary moratorium on motorized mining activities in certain designated salmon and bull trout habitat remains in effect pending the disposition of one or both of these cases. Interested parties should await the Ninth Circuit's ruling in Bohmker for further insight into the ultimate fate of SB 838.