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A special thank you to our talented contributors for their summaries: Lia Commerford, Earthrise Law Center, Connie Sue Martin, Schwabe Williamson & Wyatt, and Dallas DeLuca, Markowitz Herbold PC.. If you or someone you know is interested in summarizing cases or rules, please do not hesitate to contact me.

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9th Circuit Cases

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1. ***Cascadia Wildlands v. Scott Timber Co.***, No. 17-35038, 2017 WL 5493908 (9th Cir. Nov. 16, 2017). *Author:* Lia Commerford, Earthrise Law Center.

Plaintiffs Cascadia Wildlands, Center for Biological Diversity, and Audubon Society of Portland (collectively, "Plaintiffs") filed a lawsuit pursuant to the Endangered Species Act ("ESA") against two logging companies, Scott Timber Co. and Roseburg Forest Products (collectively, "Defendants"). The ESA prohibits the "take" of protected species, including marbled murrelets. 16 U.S.C. 1538(a)(1). The lawsuit alleged that a planned logging project in occupied marbled murrelet habitat would constitute a "take" of the marbled murrelet in violation of ESA section 9. The Plaintiffs moved for a preliminary injunction seeking to halt the logging project until the district court could decide the merits of the case.

To obtain a preliminary injunctive, a plaintiff must "establish a likelihood of success on the merits, a likelihood the plaintiff will suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in the plaintiff's favor, and that the injunction is in the public interest." *Cascadia Wildlands, et al v. Scott Timber Co. et al*, 190 F. Supp. 3d 1024 (D. Or. 2016). In *Winter v. Natural Res. Def. Council*, the Supreme Court held that in order to obtain a

preliminary injunction, a plaintiff must prove that harm is likely, not merely possible. 555 U.S. 7, 22 (2008).

The district court granted Plaintiffs' request for a preliminary injunction, applying a "sliding scale" standard to Plaintiffs' request for a preliminary injunction: "a preliminary injunction is warranted where the plaintiff demonstrates that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor" and the other elements of the *Winter* test are satisfied. *Cascadia Wildlands*, 190 F. Supp. at 1033. The district court also found that Plaintiffs provided Defendants with adequate notice of their intent to sue and that Plaintiffs had standing to pursue their case.

On appeal, the Ninth Circuit affirmed that Plaintiffs had standing. *Cascadia Wildlands, et al v. Scott Timber Co. and Roseburg Forest Products, Co.*, 2017 WL 5493908, at *1 (9th Cir. 2017). The Ninth Circuit also found that the district court did not abuse its discretion in finding that there were serious questions going to the merits of the case, that the balance of equities tipped in Plaintiffs' favor, and that an injunction was in the public interest. *Id.* at *1–2.

However, the Ninth Circuit found that the District Court erred as a matter of law in treating a showing of "serious questions to the merits" as equivalent to a showing of "likelihood of success on the merits." *Id.* at *2. As the Ninth Circuit articulated, the Supreme Court in *Winter* made clear that plaintiffs must prove a likelihood of success on the merits to obtain a preliminary injunction, a standard that is higher than the serious questions standard. *Id.* Therefore, the Ninth Circuit reversed and remanded to the District Court to apply the proper standard. *Id.*

2. ***Havasupai Tribe v. Provencio et al.***, 876 F.3d 1242 (9th Cir. Dec. 12, 2017). *Author:* Connie Sue Martin, Schwabe Williamson & Wyatt.

In a companion case to *National Mining Association v. Zinke*, 877 F.3d 845 (9th Cir. 2017), the 9th Circuit Court of Appeals rejected the Havasupai Tribe's (Tribe) challenge to the determination that the twenty-year withdrawal of more than one million acres of public lands around the Grand Canyon from new mining claims did not extinguish the "valid existing rights" to mine for uranium within the withdrawal area. The decision will allow the Canyon Mine, originally claimed in 1978 but shuttered since 1992, to return to active operations.

The Tribe asserted four claims under the Administrative Procedures Act (APA): (1) the United States Forest Service (USFS) violated the National Environmental Policy Act (NEPA) by failing to prepare an Environmental Impact Statement (EIS) in connection with its determination regarding the validity of the mining claim; (2) the USFS violated the National Historic Preservation Act (NHPA) by failing to conduct a full § 106 consultation with the Tribe; (3) alternatively, the USFS violated the NHPA by failing to update its original § 106 analysis; and (4) the USFS's determination that the mine could be operated at a profit – a prerequisite for balancing competing uses of public lands under the federal Mining Act – was erroneous.

In deciding the Tribe's NEPA claim, the court held that the resumption of mining, even after a long hiatus, would not change the status quo and therefore no EIS was required. Although the

original approval of the plan of operations for the mine was a major federal action, that action was complete in 1988 when the plan was approved, and the resumed operations did not require any additional government action so as to trigger NEPA. 876 F.3d. 1250.

Similarly, in deciding the Tribe's two NHPA claims, the court concluded that the "undertaking" requiring consultation with the Tribe under the act was the original approval of the plan of operations of the mine, in 1988. The Tribe conceded that the original approval process included the necessary § 106 consultation, but argued that the act imposes a continuing obligation on federal agencies to address the impact on historic properties at any stage of an undertaking. The court disagreed, noting that the definition of "undertaking" under the regulations implementing the NHPA does not impose a continuing obligation to evaluate previously approved projects. 876 F.3d 1251.

The Tribe's Mining Act claim was disposed of on prudential standing grounds. The APA imposes a prudential standing requirement: in addition to alleging an injury-in-fact, a person suing under the APA must assert an interest that is arguably within the zone of interests to be protected or regulated by the statute alleged to have been violated. The Mining Act protects those with competing economic interests in public land that are (or are akin to) property rights. Because the Tribe lacked a property interest in the public lands at issue, it lacked prudential standing to claim a violation of the Mining Act. 876 F.3d at 1254.

3. ***Nat'l Mining Ass'n v. Zinke***, 877 F.3d 845 (9th Cir. Dec. 12 2017). *Author*: Connie Sue Martin, Schwabe Williamson & Wyatt.

The Ninth Circuit Court of Appeals recently upheld the withdrawal from new uranium mining claims of more than one million acres of federally owned public land near the Grand Canyon. The case, a companion to *Havasupai Tribe v. Provencio*, 876 F.3d 1242 (9th Cir. 2017), addressed claims based on the Federal Land Policy and Management Act (FLPMA) and the National Environmental Policy Act (NEPA).

In response to local concerns about uranium mining near the Grand Canyon, the Department of Interior (DOI) proposed the withdrawal of land from new claims in order to protect the Grand Canyon watershed. The withdrawal became effective immediately upon the 2009 publication of the Notice of Intent, while DOI studied the anticipated impact of the proposed withdrawal.

Three years later, based on a final Environmental Impact Statement and a scientific report analyzing soil, sediment, and water samples in the proposed withdrawal area, DOI issued a Record of Decision (ROD) withdrawing approximately one million acres from new claims for 20 years. Valid, existing rights were not affected by the withdrawal. The ROD acknowledged substantial uncertainty regarding water quality and quantity in the area, the possible impact on perched and deep aquifers, and the effect of radionuclide exposure on plants, animals, and humans. Indeed, there was disagreement among analysts at DOI whether the scientific data was sufficient to justify the withdrawal. Nonetheless, DOI concluded that the withdrawal was justified based on the risk of groundwater contamination and the potential irreversible damage to tribal traditional cultural and sacred places. 877 F.3d at 860.

In disposing of the FLPMA claims, the court analyzed the legislative history of the Act and agreed with the Mining Association's argument that section 204(c)(1) of FLPMA was an unconstitutional legislative veto, but concluded that invalidating the provision did not affect DOI's withdrawal authority. 877 F.3d at 866. The court also concluded that DOI's withdrawal decision was supported by "reasoned analysis," and despite the diversity of opinion about the scientific evidence supporting withdrawal, the decision was neither arbitrary nor capricious. *Id* at 868.

The court also rejected the Mining Association's claim that DOI lacked the authority under FLPMA to withdraw such a large tract of land in order to protect cultural or tribal resources because the withdrawal covered a large swath of land and multiple sites, rather than particular sites or sacred areas. "Nothing in FLPMA or our case law indicates that the Secretary may not withdraw large tracts of land in the interest of preserving cultural and tribal resources. . . [or] that a withdrawal must be restricted to narrow carveouts tracing the perimeter of discrete cultural and historical sites, as opposed to a larger area containing multiple such sites." 877 F.3d at 869.

With regard to the NEPA claims, the Association asserted that the EIS was incomplete regarding a critical aspect of the withdrawal, the connection between uranium mining and increased uranium concentrations in groundwater in the withdrawn area. The court disagreed, finding the EIS adequate because it identified the missing information, discussed its relevance, weighed the available scientific evidence, and presented its conclusions regarding potential environmental impact based on the available data. 877 F.3d at 875.

The court also rejected the contention that DOI failed to adequately coordinate and consult with the counties impacted by the withdrawal. DOI held public meetings, designated the counties as cooperating agencies, and conducted an expanded economic impact analysis based on comments it received, demonstrating that DOI fully acknowledged and considered the counties' concerns regarding the withdrawal. *Id*. at 877.

4. ***Navajo Nation v. Dept. of the Interior***, 876 F.3d 1144 (9th Cir. Dec. 4, 2017). *Author:* Connie Sue Martin, Schwabe Williamson & Wyatt.

The 9th Circuit Court of Appeals recently concluded that the Navajo Nation lacked standing to challenge published Department of Interior (DOI) Guidelines for making "surplus" and "shortage" determinations for the delivery to Western states of waters of the Colorado River in which the Nation has reserved but unadjudicated water rights.

The Navajo Reservation is the largest Indian Reservation in the United States, covering parts of Arizona, New Mexico, and Utah and lying almost entirely within the drainage basin of the Colorado River. When the Navajo Reservation was created there was reserved, by implication, a sufficient quantity of water necessary to accomplish the purposes of the Reservation – providing a permanent homeland for the Navajo. Although the Nation's water rights have never been adjudicated or quantified, the right to a sufficient quantity of water vested as of the date of the creation of the Reservation, it trumps the rights of later appropriators, and it is not lost through non-use.

The Colorado River is "pervasively managed, regulated, and contested." 876 F3d at 1153. Federal statutes and regulations, Supreme Court decrees, interstate compacts, state and federal common law, and domestic and foreign treaties affect the allocation and management of the river's water. The share of each state is dictated by a 1964 decree, as is the allocation of surplus water. The DOI has discretion to determine surplus and shortage years, and to apportion shortfalls in years of water shortages. Prior to issuing the guidance challenged by the Navajo, DOI made year-to-year determinations about declaring a shortage or surplus, based on a variety of factors. This ad hoc approach created uncertainty, which DOI sought to remedy by adopting specific, objective criteria for determining surpluses and shortages.

The Nation contended that when the DOI issued its Guidelines, it was required under the National Environmental Policy Act (NEPA) to consider their impact on the Nation's reserved water rights. The Nation alleged that the DOI's actions would create third-party reliance and political inertia, making it increasingly difficult to secure the Nation's water rights, notwithstanding the seniority of those rights.

The court acknowledged that the Nation's unquantified water rights are a sufficiently concrete interest, the impairment of which would, when coupled with a procedural violation, give rise to standing under NEPA. "[I]t is enough to establish standing to demonstrate that however [the Nation's] rights are delineated, they are threatened by the Guidelines." 876 F.3d at 1162. However, the court concluded, the injury to the Tribe's rights by the Guidelines was too speculative to confer standing. "The Nation need not provide smoking-gun allegations of harm. But mere speculation or subjective apprehension about future harm does not support standing." 876 F.3d at 1163.

5. ***Turtle Island Restoration Network et. al v. U.S. Dept. of Commerce et. al***, 878 F.3d 725 (9th Cir. Dec. 27, 2017). Author: Dallas DeLuca, Markowitz Herbold PC.

Plaintiffs challenged the decision of the National Marine Fisheries Service ("NMFS") to allow the Hawaii-based swordfish fishery to increase longline fishing. The Ninth Circuit Court of Appeals held that the U.S. Fish and Wildlife Service ("FWS") decision to grant to the NMFS for this fishery action a special purpose permit for taking migratory birds was arbitrary and capricious, as was the NMFS's "no jeopardy" conclusion under the Endangered Species Act ("ESA") in its biological opinion ("BiOp") concerning loggerhead turtles. The court reversed the district court's grant of summary judgment on those issues. The court affirmed the grant of summary judgment concerning NMFS's decision that there was no jeopardy to leatherback turtles.

The Hawaii-based swordfishing industry uses longlines, each with hundreds of shallow-set baited hooks which sometimes snare turtles and birds as bycatch. In 2004, the NMFS set a maximum number of interactions between longlines and leatherback and loggerhead turtles of 16 and 17, respectively, per season, and limited the fishery to 2,120 lines per season. 878 F.3d at 731. Leatherback and loggerhead turtles are both listed as endangered under the ESA.

In 2009, the NMFS issued a rule, supported by a BiOp, that amended the fishery plan to increase the number of lines and interactions between turtles and lines. The plaintiffs challenged the new rule and the BiOp. After a settlement that withdrew the BiOp and suspended part of the new plan, the NMFS issued a new BiOp in 2012 to support the change to the fishery plan. *Id.* at 731-32. The new NMFS plan would remove the limit on the number of longlines per season and would increase the maximum number of allowed interactions between the longlines and leatherback and loggerhead turtles to 26 and 34, respectively. *Id.* at 732. The NMFS concluded in the 2012 BiOp that the proposed plan would not jeopardize the survival of the two turtle species (a "no jeopardy" conclusion). *Id.* Also, the FWS granted a special purpose permit to the NMFS under the Migratory Bird Treaty Act ("MBTA") to allow the fishery to take hundreds of migratory birds from five different species, one of which was listed under the ESA. *Id.*

The MBTA is a strict liability criminal statute against taking migratory birds unless permitted by the FWS. The FWS can grant such permits for, *inter alia*, "'special purpose activities related to migratory birds,' where the applicant 'makes a sufficient showing' that the activity would be 'of benefit to the migratory bird resource, important research reasons, reasons of human concern for individual birds, or other compelling justification.'" 878 F.3d at 734 (quoting 50 C.F.R. § 21.27(a)). The FWS concluded that granting the permit for the fishery would provide a net economic benefit for the nation, would allow the fishery to provide a model internationally for responsible conversation practices, and would displace foreign fishing vessels that would do even more harm. *Id.*

The court concluded that the rule's requirement that the purpose of the permit must be "related to migratory birds" was not met for a permit to increase commercial fishing and thus violated the MBTA. *Id.* at 735-36. Also, the FWS's interpretation of the rule simply to allow for "basic commercial activities" was inconsistent with the MBTA's "conservation intent." *Id.* at 735 & 736.

The court noted that the ESA permits "agencies to authorize actions that will result in the taking of endangered or threatened species only if the projected take 'is not likely to jeopardize the continued existence of' any listed species. '*Jeopardize the continued existence* of means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.'" *Id.* at 735 (quoting 16 U.S.C. § 1536(a)(2) and 50 C.F.R. § 402.02 (emphasis added in original)).

The NMFS in the 2012 BiOp analyzed the viability of loggerhead turtles over a 25-year period both with and without the proposed action of increasing the caps on interactions and the number of longline sets. Under both scenarios, the models predicted that the population of loggerhead turtles would fall below the quasi-extinction level in 99.5 percent of the tests run. *Id.* at 736-37. The models predicted that the additional sets of longlines would increase mortality by one adult female loggerhead turtle per year compared to the baseline. *Id.* The FWS concluded that the additional longline sets created a "negligible impact" compared to all the other factors that would decrease the population. *Id.*

The court concluded that the FWS erred when it compared the impact of the proposed action to the impact of the other baseline factors. *Id.* at 738. The court stated that the relevant inquiry is

not a *comparison* to the background baseline factors but instead is "whether the [proposed] 'action effects, *when added* to the underlying baseline conditions,' are such that they would cause jeopardy." *Id.* at 737-38 (emphasis added; quoting *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 929 (9th Cir. 2008)).

The BiOp for the leatherback turtles predicted that without the proposed action of increasing interactions with longlines, the leatherback turtle population would increase. With the proposed action, the population would decrease by 16 percent to 30 percent. *Id.* at 737. But, the "extinction risk" remained "low." *Id.*

The plaintiffs argued that the NMFS erred in limiting the analysis to 25 years, because both the fishery and climate change impacts would extend beyond 25 years. The court rejected that argument because the 25-year model was the best scientific data available to the NMFS and, therefore, the NMFS decision was not arbitrary and capricious. *Id.* at 739.

The plaintiffs argued that the NMFS erred when it did not quantify the impacts of climate change on the turtle species as part of the BiOp. The court rejected that argument and concluded that the agency was not arbitrary or capricious when it decided that the available data were "too indeterminate for the agency to evaluate the potential sea-turtle impacts with any certainty." *Id.* at 740. The plaintiffs "failed to sufficiently refute the NMFS's stated inability to offer more specific predictions on the effects of climate change, and they have not alleged that less speculative scientific information is available that the agency overlooked." *Id.* at 740.