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Recent Environmental Cases and Rules

Environmental and Natural Resources Section — Oregon State Bar
Devin Franklin, Editor — October 2018

Editor's Note: This issue contains selected summaries of cases issued in July, August, September (and part of October) of 2018.

A special thank you to our talented contributors for their summaries: Dave Becker of the Law Office of David H. Becker, LLC., Alexa Shasteen of Marten Law, Ryan Shannon of the Center for Biological Diversity, Dan Hytrek of National and Oceanic Administration Office of the General Counsel, and Connie Sue Martin of Schwabe Williamson & Wyatt.

If you are interested in summarizing cases or rules, please do not hesitate to contact me.

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Cases

1. ***Alliance for the Wild Rockies v. U.S. Forest Serv.***, 899 F.3d 970, *as amended on denial of reh'g*, --- F.3d ---, 2018 WL 5292069 (9th Cir. Oct. 25, 2018).
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Ninth Circuit

1. ***Alliance for the Wild Rockies v. U.S. Forest Serv.***, 899 F.3d 970, *as amended on denial of reh'g*, --- F.3d ---, 2018 WL 5292069 (9th Cir. Or., Oct. 25, 2018). Author: Dave Becker of the Law Office of David H. Becker, LLC.

This case involved a challenge to the 80,000-acre Lost Creek logging project in Idaho's Payette National Forest. The appellants—three environmental organizations—argued that the Forest

Service violated the National Forest Management Act ("NFMA") by acting inconsistently with the Payette Forest Plan when the agency created a new definition of "old forest habitat" and designated certain lands to be managed for "landscape restoration" as opposed to "commercial production." They also challenged the Forest Service's designation of a Minimum Road System ("MRS") for the Project, and claimed that the Forest Service violated the National Environmental Policy Act ("NEPA") and the Endangered Species Act ("ESA"). The district court had granted summary judgment in favor of the federal agency and intervenors.

The Ninth Circuit reversed the district court's summary judgment on the NFMA claims. NFMA requires that all site-specific projects must be consistent with the Forest Plan. 16 U.S.C. § 1604(i). The Payette Forest Plan establishes desired conditions for the forest, and then sets standards and guidelines to achieve those conditions. The Forest Plan contains separate categories to determine how land is managed, including "restoration" ("MPC 5.1") and "commercial production" ("MPC 5.2").

However, the Project eliminated MPC 5.2 and replaced it with MPC 5.1. The Court agreed with appellants that, because the standards, guidelines, and desired conditions for MPC 5.1 are different than—and in some cases less protective than—those of MPC 5.2, the adoption of MPC 5.1 violated NFMA. In particular, the switch from MPC 5.2 to MPC 5.1 eliminated a binding fire standard that prohibited wildland fire use. Rejecting the intervenors' argument that the fire prescriptions of the two management categories are "substantially similar," the Court reiterated that its scope of review under NFMA does not include attempting to discern whether the new standards are substantially similar, but rather requires the agency to show that it ensured the Project was consistent with the actual standard in the Forest Plan—which the Forest Service could not do because it failed to articulate a rational explanation for deviating from the Plan's standard and the NFMA consistency requirement. Similarly, the Ninth Circuit held that the deletion, without explanation, of another Forest Plan fire guideline in the Lost Creek Project decision was arbitrary and capricious in violation of NFMA's consistency requirement.

The Court of Appeals further held that the switch from MPC 5.2 to MPC 5.1 rendered the Project inconsistent with the desired vegetative condition—the vision of the long-term conditions of the land—set out in the Forest Plan because the switch from MPC 5.2 to MPC 5.1 resulted in the imposition of new desired vegetative conditions with the potential to alter the landscape. The Court rejected the Forest Service's assurances that MPC 5.1 was nevertheless consistent with the Plan because they were not reflected in the administrative record, which showed clear deviations from the desired condition set forth in the Forest Plan.

And the Court also held that the Project's definition of "old forest habitat" was inconsistent with the Forest Plan's definition of "old forest." The Forest Plan's definition requires maintaining at least 20% of the acres within each potential vegetation group as "large trees," but the Project's new "old forest habitat" definition led to a finding in the Project's decision documents that no stands of trees in the Project area met all the attributes of "old forest habitat"—despite the Forest Plan's acknowledgement of the historic presence of both large trees and old growth in virtually all of the potential vegetation groups. Accordingly, the Forest Service's decision to adopt a new definition of "old forest habitat" was inconsistent with the Forest Plan, in violation of NFMA.

The Ninth Circuit affirmed the district court as to the claim regarding the MRS. The 2001 Forest Service Travel Management Rule, requires the agency to "identify the [MRS] needed for safe and efficient travel and for administration, utilization, and protection of National Forest System lands" to meet resource and other management objectives. 36 C.F.R. § 212.5(b)(1). The travel analysis report for the Lost Creek Project identified 474 miles of roads in the Project area, and recommended 240 miles for the MRS (the rest would be decommissioned or closed). However, the Record of Decision for the project designated 401 miles of roads as the MRS. The Court of Appeals held that this nevertheless satisfied the regulatory requirement for designating a MRS because the agency fully explained its decision to adopt the 401-mile MRS and considered all the relevant regulatory factors in its NEPA analysis.

The Ninth Circuit also held that the Forest Service did not violate NEPA by incorporating scientific analysis and data from a series of proposed—but never adopted—Wildlife Conservation Strategy amendments to the Payette Forest Plan into the NEPA analysis for the Lost Creek Project. The appellants argued that this constituted improper "tiering" of the Project's NEPA document to a non-NEPA document. However, the Court held that, because the Project's NEPA analysis did not merely incorporate the previous scientific analysis and data, but also evaluated it in the context of the current Project and its effects on vegetative resources and wildlife, it did not constitute improper tiering to a non-NEPA document.

Finally, the Ninth Circuit noted that the parties agreed that the appellants' ESA claim—for failure to reinitiate consultation on the Project's effects on bull trout—was moot because the Forest Service had reinitiated consultation for bull trout over its entire range.

The Court of Appeals then remanded with instructions to vacate the Record of Decision for the Project, holding that vacatur of an unlawful agency action is normally required with a remand, and is presumed to be the appropriate remedy, unless equity demands that the decision be left in place. The Court determined that vacatur was appropriate because, absent vacatur, the Project would lead to the loss of several binding standards in the Forest Plan and result in management of certain areas for "restoration" rather than commodity production and a new definition of "old forest habitat" not found in the Forest Plan.

2. ***Bohmker v. Oregon***, 2018 U.S. App. LEXIS 25820 (9th Cir. Or., Sept. 12, 2018). Author: Alexa Shasteen of Marten Law.

In *Bohmker v. Oregon*, 903 F.3d 1029 (9th Cir. 2018), the United States Court of Appeals for the Ninth Circuit held in a divided opinion that Oregon Senate Bill 3, which banned motorized mining activities in certain designated salmon and bull trout habitat, was not preempted by federal statute. This publication previously covered *Campbell v. Oregon Department of State Lands*, 2017 WL 3367094 (D. Ore. 2017), in which the United States District Court for the District of Oregon stayed a different preemption challenge to a related law pending the Ninth Circuit's decision in *Bohmker*.

SB 3's mining ban was preceded by a moratorium. 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, scheduled to last from 2016 through 2021, applied to areas designated as "essential indigenous anadromous salmonid habitat" and/or containing "naturally reproducing populations of bull trout." SB 838 prohibited, 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 were 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."
Plaintiffs, who have mining claims on federal lands in Oregon, challenged SB 838 as preempted by federal statute. On summary judgment, the district court ruled SB 838 was not preempted. Plaintiffs appealed.

After briefing on appeal was completed, the Oregon legislature adopted Senate Bill 3, which "repealed the moratorium imposed by Senate Bill 838 and imposed a permanent restriction on the use of motorized mining equipment in waters designated as essential indigenous anadromous salmonid habitat." The parties agreed to treat the appeal as a challenge to Senate Bill 3, which the Ninth Circuit did.

Plaintiffs advanced three preemption arguments: (1) SB 3 is field preempted because it constitutes state "land use planning"; (2) SB 3 is conflict preempted because it is "prohibitory, not regulatory, in its fundamental character"; and (3) SB 3 is conflict preempted because it does not constitute "reasonable state environmental regulation."
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. Conflict preemption can occur 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.

The Court first traced in some detail federal laws governing mining on federal lands and federal laws governing national forests. These include the Mining Act of 1872, the Surface Resources and Multiple Use Act of 1955, the Mining and Minerals Policy Act of 1970, the Organic Administration Act of 1897, the Multiple-Use and Sustained Yield Act of 1960, the National Forest Management Act of 1976, and the Federal Land Policy and Management Act of 1976. A full discussion of these laws is beyond the scope of this article, but interested readers are encouraged to reference the Ninth Circuit's useful overview of these statutes.

The Court next addressed Plaintiffs' field preemption argument. In *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572 (1987), the United States Supreme Court "'assumed without deciding that 'the combination of the [National Forest Management Act of 1976] and the [Federal Land Policy and Management Act of 1976] pre-empts the extension of

state land use plans onto unpatented mining claims in national forest lands.'" The Ninth Circuit in *Bohmker* accepted that same assumption. However, it concluded SB 3 was not field preempted as impermissible land use planning because it was in fact "an environmental regulation." The Court noted SB 3 "does not choose or mandate land uses, has an express environmental purpose of protecting sensitive fish habitat, is not part of Oregon's land use system and is carefully and reasonably tailored to achieve its environmental purpose without unduly interfering with mining operations."

The Court also rejected Plaintiffs' second argument, which was based largely on *South Dakota Mining Association v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998). In that case, the United States Court of Appeals for the Eighth Circuit held a county ordinance was preempted by the Federal Mining Act of 1872 because it banned "the only practical way to 'actually mine the valuable mineral deposits located on federal land in the area'" and was thus a de facto prohibition on mining. The Ninth Circuit rejected Plaintiffs' contention that *South Dakota Mining* supported their proposed distinction between regulations that are "prohibitory" versus "regulatory" in their "fundamental character." The Court found "no indication that Congress intended to preempt state environmental regulation merely because it might be viewed as 'prohibitory'" and rejected the argument that "Senate Bill 3 stands as an obstacle to the accomplishment of the full purposes and objectives of Congress merely because it 'prohibits' a particular method of mining in the portions of rivers and streams containing essential habitat for threatened and endangered salmonids."

Finally, the Court evaluated Plaintiffs' assertion that SB 3 is conflict preempted because it does not constitute "reasonable state environmental regulation." The Ninth Circuit "ha[s] consistently held that Congress intended to permit reasonable environmental regulation of mining claims on federal lands." While acknowledging "that unreasonable, excessive or pretextual state environmental regulation that unnecessarily interferes with development of mineral resources on federal land may stand as an obstacle to the accomplishment of the full purposes and objectives of Congress," the Court concluded "that line has not been crossed" in this instance.
Judge N.R. Smith dissented. A full discussion of Judge Smith's opinion is beyond the scope of this article, but in short, Judge Smith concluded that "[b]ecause the permanent ban on motorized mining in Oregon Senate Bill 3 does not identify an environmental standard to be achieved but instead restricts a particular use of federal land, it must be deemed a land use regulation preempted by federal law." Judge Smith found merit in Plaintiffs' arguments that SB 3 "impermissibly…identifies a particular use of the land that is prohibited without reference to an identifiable environmental standard and…renders mining within the identified zones impracticable."

As of this writing, supplemental briefing in *Campbell* is in progress. SB 3's ban on motorized mining activities in certain designated salmon and bull trout habitat remains in effect pending the outcome of the constitutional preemption challenge in *Campbell*.

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3. ***Ctr. For Biological Diversity v. Zinke***, 2018 U.S. App. LEXIS 22947 (9th Cir. Mont., Aug. 17, 2018). Author: Ryan Shannon of the Center for Biological Diversity.

In *Ctr. for Biological Diversity v. Zinke,* Plaintiffs challenged the U.S. Fish and Wildlife Service's ("FWS") decision not to list the artic grayling as an endangered or threatened species under the Endangered Species Act ("ESA") arguing that FWS misinterpreted the term "range" in its "Final Policy on Interpretation of the Phrase 'Significant Portion of Its Range' in the Endangered Species Act's Definition of 'Endangered Species' and 'Threatened Species,'" 79 Fed. Reg. 45,578 (July 1, 2014) ("SPR policy"). Plaintiffs also challenged several aspects of FWS's decision as arbitrary and capricious.

Regarding the SPR Policy, Plaintiffs argued that defendants erred when they defined "range" in the SPR policy to mean the current range of the species at the time FWS makes any given determination regarding the status of the species. In Plaintiffs' view, "range" should refer to the species' historic range. Engaging in a *Chevron* analysis, the panel found the term "range" to be ambiguous. *Ctr. for Biological Diversity*, 900 F.3d at 1063–66. The panel then turned to whether the Service's interpretation of "range" to mean current range was a permissible construction of the statute and found that FWS's interpretation of "range" warranted deference as the ESA provided at least some support for FWS's interpretation even though FWS's interpretation was not compelled by the statute. *Id.* at 1066–67. However, the panel held that "[t]he SPR policy still requires that FWS consider the historic range of a species in evaluating other aspects of the agency's listing decision, including habitat degradation." *Id.* at 1067 (citing *Humane Soc'y of the United States v. Zinke*, 865 F.3d 585, 605-06 (D.C. Cir. 2017)).

Plaintiffs were more successful on their arguments against FWS's decision not to list the grayling under the ESA. Specifically, the panel found that FWS's failure to discuss a study finding that the graylings' population was decreasing in the Big Hole River, *id.* at 1068–69, and its dismissal of the threats posed by low stream flows and high stream temperatures in the Big Hole River were arbitrary and capricious. *Id.* at 1069–1073. In so doing, the panel said that FWS must acknowledge available data, provide a reasoned explanation for its ultimate decision not to rely on that data, *id.* at 1068–69, and provide a reasoned explanation when disregarding facts and circumstances that underlay or were engendered by prior agency findings. *Id.* at 1070.

The panel found also FWS's failure to make any finding regarding the cumulative impacts of climate change due to uncertainty to be arbitrary and capricious. *Id.* at 1072–73. In so doing, the panel noted that "it is not enough for FWS to simply invoke scientific uncertainty to justify its action. Rather, FWS must explain why uncertainty justifies its conclusion, otherwise, [the court] might as well be deferring to a coin flip." *Id.* at 1072. FWS's failure to address climate change in its decision stood in contrast to its finding in 2014 that water temperatures and decreased water flows as a result of climate change were a threat to the grayling. *Id.* at 1073.

Finally, the panel found that while FWS's determination that genetic diversity does not pose a threat to the grayling was not arbitrary and capricious, FWS's reliance on the Ruby River population as a viable population providing genetic redundancy in case of a stochastic event was. *Id.* at 1073–74. The panel ultimately reversed the district court's grant of summary judgment and

remanded FWS's determination back to the agency to reassess in light of the panel's opinion. *Id.* at 1075.

4. ***Montana Envtl. Info. Ctr. v. Thomas***, 2018 U.S. App. LEXIS 24719 (Aug. 30, 2018). Author: Dan Hytrek of National and Oceanic Administration Office of the General Counsel.

Montana Environmental Information Center (Information Center) petitioned to the Ninth Circuit Court of Appeals challenging the U.S. Environmental Protection Agency's (EPA) approval under the Clean Air Act of a revision to Montana's State Implementation Plan (Implementation Plan). The court concluded that EPA's approval was not arbitrary and capricious and denied the petition.

The Information Center argued that the EPA should not have approved revisions to the Implementation Plan in 2015 until the state definition of "actual emissions" complied with federal standards. The EPA approved a 1994 revised Implementation Plan that contained a definition of "actual emissions," which, in large part, mirrored the EPA's regulatory definition. The Information Center argued that Montana's 1994 revised Implementation Plan did not comply with the Clean Air Act because the Montana Department of Environmental Quality (DEQ) interprets "actual emissions" less stringently than federal standards would allow. The Information Center's argument was based on DEQ's interpretation of "actual emissions" advanced in unrelated litigation.

The Court concluded that EPA's interpretation of a vague regulatory term, "actual emissions," in the 1994 revised Implementation Plan was reasonable and controlling. DEQ's contrary interpretation did not carry the force of law, as argued by the Information Center, and DEQ's interpretation had no effect on the EPA's approval process for the subsequent 2015 Implementation Plan. Therefore, EPA's approval of the subsequent 2015 Implementation Plan was not arbitrary and capricious. In addition, the court concluded that the Information Center's argument regarding DEQ's interpretation of the language raised a question of implementation rather than approval of the Implementation Plan, which did not need to be resolved in this challenge to EPA's approval of the Implementation Plan.

5. ***Pakootas v. Teck Cominco Metals, LTD.***, 540 Fed. Appx. 615, 2013 U.S. App. LEXIS 19124 (9th Cir. Wash., Sept. 16, 2013). Author: Connie Sue Martin of Schwabe Williamson & Wyatt.

In the latest appellate decision in the long-running *Pakootas v. Teck Cominco* CERCLA case, the Ninth Circuit Court of Appeals upheld the Eastern District of Washington's rejection of Teck Cominco's divisibility defense to joint and several liability; affirmed the court's award of the Tribes' investigative costs incurred in establishing Teck Cominco's liability; and affirmed the Tribes' attorney fee award.

Divisibility. In a pre-trial summary judgment motion, the District Court held that Teck failed to meet its burden of establishing sufficient evidence to raise a triable issue of fact that the environmental harm to the river was theoretically capable of apportionment, or whether there was a reasonable basis for apportionment, and dismissed Teck's divisibility defense.

The Ninth Circuit performed a two-step divisibility analysis, considering: (1) whether the environmental harm is theoretically capable of apportionment, which is "primarily a question of law" in which are embedded certain factual questions such as "what type of pollution is at issue, who contributed to that pollution, how the pollutant presents itself in the environment after discharge, and similar questions"; and (2) if the harm is theoretically capable of apportionment, whether the record provides a reasonable basis on which to apportion liability, "which is purely a question of fact." In order to prevail, Teck was required to produce evidence showing divisibility of the <u>entire</u> harm caused by its wastes combined with all other river pollution, not just the harm from sources of the six metals identified in the operative complaint. The District Court concluded that Teck could not establish divisibility because it failed to account for the entire harm at the Site. The Ninth Circuit agreed, holding that Teck failed to meet its burden of apportionment by simply considering the effects of its waste in isolation from the other contaminants at the site.

The Ninth Circuit also agreed with the District Court's conclusion that "no rational trier of fact could find that Teck has provided a reasonable basis for apportionment." Teck's expert witness's volumetric analysis was deemed inadequate because it failed to consider such factors as geography, time, relative toxicity, and migratory potential of contaminants. "Absent evidence of how these factors affected the contamination of the Site, any apportionment would have been arbitrary."

The Tribes' Response Costs. The District Court awarded the Tribes "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan," pursuant to CERCLA § 107(a)(4)(A). Teck had challenged the costs of the Tribes' expert consultants for data collection and analysis as "litigation related" because they were commissioned after the Tribes joined the litigation, they were undertaken to help prove Teck's liability, and the Tribes presented much of the work /to the District Court in Phase I of trial.

The Ninth Circuit affirmed the award, declining to adopt Teck's reading of "removal" as implicitly excluding activities that have a connection to litigation. Because the Tribes brought their cost recovery action as a sovereign under § 107(a)(4)(A), rather than a private party, they are entitled to "all costs," rather than merely the "necessary" costs of response. In addition, the Court noted, the motives of the party seeking to recoup its response costs are irrelevant, and thus the intent to use the fruits of an investigation in litigation does not exclude the activity from CERCLA's statutory definition of "removal."

The Tribes' Attorney's Fees. The District Court awarded the Tribes their attorney's fees as the costs of enforcement activities under CERCLA § 107(a)(4)(A), consistent with *United States v. Chapman*, 146 F.3d 1166 (9th Cir. 1998) and *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 953 (9th Cir. 2002), which held, respectively, that the phrase "all costs" naturally includes

the government's attorneys' fees incurred during enforcement actions, and "government" means federal, state, and tribal entities identified in the statute. On appeal, the Ninth Circuit held that the award was appropriate and reasonable in amount, affirming the $4.86 million attorney's fees award for the $3.39 million awarded for investigation expenses.