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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 January, February, and March 2019.

A special thank you to our talented contributors for their summaries: Ka'Sha Bernard of Crag Law Center, Dan Hytrek of National and Oceanic Administration Office of the General Counsel, Ryan Shannon of the Center for Biological Diversity, 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 Cases

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District of Oregon

1. ***Bullseye Glass Co. v. Brown***, No. 3:17-cv-1970-JR (D Or. Jan. 2, 2019). *Author:* Ka'Sha Bernard, Crag Law Center.

Bullseye Glass Co. (Bullseye) brought suit against Governor Kate Brown, the director of the Oregon Department of Environmental Quality (DEQ), the director of the Oregon Health Authority, and the Multnomah County Health Department, asserting that the Defendants denied Bullseye "substantive due process" in violation of 42 U.S.C. 1983. Bullseye also sought a declaration that a specific federal air quality regulation did not apply to Bullseye or its operations. Defendants moved to dismiss Bullseye's claims, and in his Findings and Recommendation (F&R), Magistrate Judge Paul Papak recommended dismissing both of Bullseye's claims with prejudice. Judge Michael Simon adopted in part and declined to adopt in

part the F&R, granting the Defendants' motion to dismiss the Section 1983 claim and denying the motion to dismiss the second claim.

In 2016, the DEQ concluded that airborne emissions from Bullseye's glass-making operations might contain pollutants that present a serious public health concern, based on a study investigating the presence of heavy metals in moss found on trees in Portland. DEQ then conducted emissions testing close to Bullseye's facilities, finding daily concentrations of arsenic and cadium above typical urban concentrations. The Environmental Protection Agency's (EPA) Regulation 6S is intended to control metal emissions from glass manufacturing facilities. Initially, both DEQ and EPA found that 6S did not apply to Bullseye, but the EPA subsequently issued a non-binding regulatory interpretation concluding that the DEQ had discretion to determine if 6S was applicable to Bullseye. Bullseye and the DEQ entered into a Mutual Agreement and Final Order (MAO), which provides that the DEQ concluded that Bullseye was subject to 6S and that Bullseye disagrees with DEQ's conclusion.

In its first claim, Bullseye alleged that the Defendants violated its right to substantive due process under the Fourteenth Amendment. Bullseye conceded that the actions at issue involved a "non-fundamental right." In these situations, the Supreme Court generally requires proof of governmental conduct that "shocks the conscience." Because Bullseye did not offer any specific factual allegations against the Defendants showing improper motive, a sudden change of course, false justification, or a singling out of a specific person or company for differential treatment that was arbitrary or discriminatory, the court found that Bullseye did not sufficiently allege any conduct by the Defendants that "shocks the conscious." Accordingly, the court held that Bullseye failed to state a claim for violation of its right to substantive due process, and dismissed the claim with prejudice.

In its second claim, Bullseye sought a declaration that it is not subject to federal Regulation 6S, and that Oregon's assertion of authority under Regulation 6S is unlawful. The Defendants asserted that the court lacked subject matter jurisdiction and/or that the doctrine of claim preclusion barred Bullseye's claim. Defendants asserted that the court lacked subject matter jurisdiction on grounds that because DEQ regulated Bullseye under state law, Defendants are entitled to immunity under the Eleventh Amendment, which generally protects States from suit in federal court. The court, however, found that the DEQ's state enforcement action depended on the agency's own interpretation of a federal rule. The court thus concluded that there was a dispute over the meaning and applicability of a *federal* regulation, providing subject matter jurisdiction over Bullseye's request. The court further decided that even if the federal nature of the dispute was not apparent, the court would have "arising under" jurisdiction based on *Grable & Sons Metal Prods., Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005). In that case, the Supreme Court held that a case may "arise under" federal law when a state-law claim contains a federal issue that is (1) necessarily raise, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance. The court found each of the conditions present here.

The Defendants also argued that Bullseye's second claim was barred by claim preclusion because the claim presented the same set of facts and law that was expressly and finally resolved by the MAO. In the MAO, the parties agreed to disagree about the interpretation of 6S, with

Bullseye promising to comply with Regulation 6S unless and until there was a ruling by an appropriate court that it did not apply. The court found that nothing in the MAO restricted Bullseye from seeking declaratory or injunctive relief to resolve a dispute about the interpretation of Regulation 6S; in fact, under the MAO the parties reserved the final resolution of their legal dispute involving regulatory interpretation and application, which was now the subject of the case at bar. Thus, the court declined to dismiss Bullseye's second claim on grounds of claim preclusion.

2. ***WildEarth Guardians v. Jeffries***, No. 2:17-cv-01004-SU (D. Or. Jan. 3, 2019). *Author:* Dan Hytrek of National and Oceanic Administration Office of the General Counsel.

Plaintiffs, environmental advocacy organizations and a hunters association, filed suits challenging the U.S. Forest Service's Supplemental Final Environmental Impact Statement (SFEIS) and Record of Decision (ROD) approving the Ochoco Summit Trail System Project in the Ochoco National Forest. The Project provides for a 137-mile network of roads and trails for off-highway vehicle use. The Magistrate Judge issued a Findings and Recommendation in 2018, in which she recommended that the District Court grant in part and deny in part the parties' motions for summary judgment, vacate the Forest Service's decision, and remand for further proceedings. Several parties filed timely objections. The District Judge adopted the conclusions of the Magistrate's Findings and Recommendation, except for a few clarifications and exceptions, and vacated and remanded the SFEIS and ROD to the Forest Service for further proceedings.

The Magistrate concluded that the plaintiffs did not meet the limited exceptions for introduction of extra-record evidence under the Administrative Procedure Act, and the evidence was not relevant for purposes of review under the Endangered Species Act (ESA). The Magistrate concluded that the amicus' motion to submit extra-record evidence was improper, because amicus are not party to the litigation, and the extra-record evidence would be inadmissible for the same reasons as the plaintiffs' extra-record evidence. In addition, the Magistrate concluded that the plaintiffs established standing to bring each of its claims.

The Magistrate concluded that the Forest Service's conclusion that the Project would have "No Effect" on the gray wolf was erroneous and violated the ESA and the National Environmental Policy Act (NEPA). The Forest Service's conclusion was based on a finding that there were no breeding packs in the Forest, and no wolves were known to consistently occupy the Project Area. However, the Magistrate noted that the first step in the ESA section 7 consultation process is determining whether a listed species may be present in the area of the proposed action, and there were numerous references in the administrative record to gray wolf presence in the Forest. Therefore, the Forest Service must reevaluate whether the Project may affect the gray wolf. The District Judge adopted the Magistrate's conclusion that the Forest Service's determination that its action would have "No Effect" on gray wolves violated the ESA and NEPA. However, the District Judge clarified that the Forest Service must formally consult with the Fish and Wildlife Service under ESA implementing regulations, unless it is excepted from formal consultation by meeting certain requirements set forth in the ESA implementing regulations.

The District Judge adopted the Magistrate's conclusion that the Forest Service violated the National Forest Management Act (NFMA) and NEPA in regard to elk habitat claims. Federal Defendants argued that the Magistrate exceeded the scope of her authority under the Administrative Procedure Act by ordering the Forest Service to map calving sites and wallows on remand. The District Judge explained the Magistrate's reasoning for her finding and recommendation on the subject being that, without data regarding the location of elk calving sites and wallows, the Forest Service failed to provide a rational explanation for how the project meets the Forest Plan's requirement to protect those sites and minimize disturbances. The District Judge did not read the finding and recommendation as requiring actual mapping of the sites; the Forest Service could choose how to remedy the error.

The Magistrate concluded that the Forest Service was arbitrary and capricious in analyzing whether the Project met the Forest Plan's road density standards for the protection of big game habitat, because the SFEIS contains unexplained, inconsistent road mileage calculations and figures, and the Forest Service omitted user-created trails from road density calculations. In addition, the SFEIS and ROD did not provide any analysis regarding compliance with the Forest Plan requirement that roads and trails "be at the lowest density which meets long-term resource needs." Furthermore, the Magistrate concluded that the Forest Service failed to analyze the impact of user-created roads on elk security habitat. This failure resulted in an arbitrary and capricious decision under NEPA.

The Magistrate concluded that the Forest Service failed to adequately identify elk calving and rutting sites, nor did it sufficiently articulate how those areas will be protected during the time that vehicle use overlaps with calving and rutting seasons. Therefore, the Forest Service failed to take a hard look at these effects under NEPA.

The Magistrate concluded that the Forest Service's cumulative impacts analysis was insufficient, and arbitrary and capricious, regarding road density and user-created roads, but it was sufficient regarding other claimed deficiencies.

With regard to Redband trout and arguments that the Forest Service failed to protect riparian habitats from recreational impacts, the Magistrate concluded that the Forest Service complied with NEPA in analyzing baseline conditions of watersheds, analyzing cumulative effects on aquatic habitats, and analyzing a specific subwatershed. In addition, the Magistrate concluded that the Forest Service did not violate the Inland Fish Strategy (INFISH) as to retarding or preventing attainment of Riparian Management Objectives (RMOs). The District Judge adopted the Magistrate's conclusions regarding riparian claims under NFMA and NEPA, except the District Judge disagreed with her finding that the Forest Service properly supported its modification of INFISH RMOs for woody debris, riparian temperature, and width/depth ratios. Based on INFISH requirements, the District Judge concluded that a Forest Service manager may replace INFISH interim RMOs, which were considered the best watershed scale information available at the time they were adopted in 1995, with site-specific non-interim RMOs only after completion of watershed analysis and may modify INFISH interim RMOs for particular projects in the absence of watershed analysis only where watershed or stream reach specific data support the change. The Forest Service's explanations for its modifications to the INFISH interim

RMOs did not cite to such watershed or stream reach specific analysis or data. Therefore, the District Judge did not adopt the Magistrate's conclusion that the Forest Service complied with INFISH requirements in modifying RMOs.

Finally, the Magistrate concluded that the SFEIS failed to demonstrate application of the Travel Management Rule minimization criteria with regard to minimizing effects on forest resources and conflicts among motor vehicle use and existing recreational use, specifically as to how trail routes were designated and located.

9th Circuit

3. ***Cheranik v. Brown***, 295 Or App 584 (Jan. 9, 2019). *Author*: Ryan Shannon, Center for Biological Diversity.

Plaintiffs, several minors and their guardians, sued Defendants, the State of Oregon and Governor Kate Brown, in Oregon state court for Oregon's alleged failure to take sufficient steps to protect the state's public-trust resources from the effects of climate change. *Chernaik v. Brown*, 295 Or. App. 584, 586 (2019). After the trial court granted the state's motion for summary judgment and found that the public-trust doctrine only encompassed state submerged and submersible lands and that the state does not have a fiduciary duty to protect public-trust resources from the effects of climate change, Plaintiffs appealed. *Id.*

Under Plaintiffs' theory of the case, the public-trust doctrine applied to all "vital natural resources;" namely the waters of the state, submerged and submersible lands, islands, shorelands, coastal areas, wildlife, fish and the atmosphere. *Id.* at 587. Oregon, as the holder of the trust, thus has a fiduciary obligation to protect and preserve those resources. *Id.* Plaintiffs alleged that Oregon has failed to uphold that obligation and had a duty to protect those resources for future use. *Id.* at 587.

On review, the Court of Appeals first noted the historical basis of the public-trust doctrine. Namely, that upon admission to the Union, Oregon obtained title to the submerged and submersible land underlying navigable waters. *Id.* at 592. The state's ownership of that land is divided into two aspects: (1) the *jus privatum*, which includes the power of alienation; and (2) the *jus publicum*, which is the common-law based public-trust doctrine *per se* in which the state holds the title to submerged and submersible lands in trust for the public for the purposes of navigation, fishing, and recreation. *Id.* at 593. Unlike *jus privatum*, the state cannot alienate *jus publicum* and the state has the power to intervene in actions that would affect the public's interest in those lands. *Id.*

The court then reviewed the common-law jurisprudence of the public-trust doctrine in Oregon and found that the public-trust doctrine historically restrained the state from taking action that would impair the public's use of those waterways. *Id.* at 594.

Regarding Plaintiffs' claims, the court of appeals found that it did not need to consider whether the public-trust doctrine included natural resources other than submerged and submersible lands, because it found that—while the public trust doctrine restrains actions taken by the state—it does not impose a fiduciary duty on the state to protect public trust resources from the effects of climate change. *Id.* a 594–600. The court of appeals noted that the public trust doctrine is a matter of state common-law, and thus is not informed by other constitutional, statutory, or regulatory duties. *Id.* at 597. It also found Plaintiffs' reliance on *Geer v. Connecticut*, 161 U.S. 519 (1896), concerning the state's authority to regulate wildlife unavailing as that case only gave the state authority to regulate game, but did not impose an affirmative duty on the state to do so. *Id.* at 597–598. The court of appeals similarly rejected Plaintiffs' reliance on *State v. Dickerson*, 356 Or. 822, 345 P.3d 447 (2015).

The appellate court noted, however, that the trial court dismissed the case without entering a judgment regarding the parties' rights. It remanded the case back down to the trial court to enter the appropriate declaratory judgment. *Id.* at 601

4. ***WildEarth Guardians v. Provencio*, No. 17-1737 (9th Cir. Mar. 13, 2019).** *Author:* Alexa Shasteen, Marten Law.

In *WildEarth Guardians v. Provencio*, 918 F.3d 620 (9th Cir. 2019), the Ninth Circuit affirmed the United States Forest Service's travel management plans for the Kaibab National Forest in Arizona. Environmental groups had challenged the Forest Service's travel management plans under the U.S. Department of Agriculture's Travel Management Rule. The controversy centered on the regulation of motorized big game retrieval under the Rule.

The Forest Service's 2005 Travel Management Rule designates areas within the National Forest system in which motor vehicle use is permitted. The rule provides that

> In designating routes, the responsible official may include in the designation the limited use of motor vehicles within a specified distance of certain forest roads or trails where motor vehicle use is allowed, and if appropriate within specified time periods, solely for the purposes of dispersed camping or retrieval of a downed big game animal by an individual who has legally taken that animal.

Pursuant to this rule, the Forest Service developed travel management plans for each of the three Ranger Districts in the Kaibab National Forest: the Williams Ranger District, the Tusayan Ranger District, and the North Kaibab Ranger District.

In the Williams Ranger District, the Forest Service permitted "the limited use of motor vehicles within one mile of all designated system roads (except where prohibited) to retrieve a legally hunted and tagged elk during all elk hunting seasons." The rule required hunters to make only one trip using the most direct route and causing the least ground disturbance.

In the Tusayan Ranger District, the plan permitted motorized elk retrieval under similar circumstances with the added caveat that such the travel could not damage natural and/or cultural resources and could not "cross riparian areas, streams and rivers except at hardened crossings or crossings with existing culverts."

In the North Kaibab Ranger District, the plan permitted motorized retrieval of both elk and bison during hunting season.

Environmental groups WildEarth Guardians, Grand Canyon Wildlands Council, Wildlands Network, and Sierra Club appealed. They argued "that the Forest Service violated the Travel Management Rule by permitting off-road motorized vehicle use to collect downed game within one mile of every open road in the Districts, in…violation of the Rule's mandate that such activity be 'limited' and only on 'certain' roads."

The Ninth Circuit agreed with the Forest Service's argument that although the plans did not provide much *geographic* limitation on motorized game retrieval, they did include restrictions like limiting retrieval to legally hunted elk and bison during hunting season and requiring the hunter to take the most direct route.

Appellants also asserted that permitting motorized game retrieval within one mile of all designated roads was incompatible with the rule's permission of motorized game retrieval on "certain forest roads." The Ninth Circuit agreed with the Forest Service "that while the word 'certain' can mean 'some, but not all,' the more common definition of the term is 'definite' or 'fixed.'" Therefore, "[b]ecause the Forest Service limited motor vehicle use to a defined set of roads in each District, it complied with the Rule."

The Ninth Circuit also rejected appellants' challenges under the National Environmental Policy Act and National Historic Preservation Act.