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Recent Environmental Cases and Rules

Environmental and Natural Resources Section Oregon State Bar

Devin Franklin, Editor
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Editor's Note: This issue contains selected summaries of cases issued in April, May, and June 2019.

A special thank you to our talented contributors for their summaries: Chris Thomas of the Freshwater Trust, Dan Hytrek of National and Oceanic Administration Office of the General Counsel, Dave Becker of The Law Office of David Becker, and Matthew Query of Yockim Law. If you are interested in summarizing cases or rules, please do not hesitate to contact me.

Devin Franklin

Devin.Franklin@mcda.us

District of Oregon Cases

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District of Oregon

1. ***Bark v. United States Forest Serv.,*** No. 3:18-cv-01645-MO, 2019 US Dist. LEXIS 101649 (D Or. June 18, 2019). *Author: Chris Thomas, Fresh Water Trust.*

Plaintiffs, environmental advocacy organizations, filed suit challenging the U.S. Forest Service's authorization of forest thinning on the southeast slope of the Mount Hood National Forest ("MHNF"). Plaintiffs claimed that the authorization violated the National Environmental Policy Act ("NEPA"), the National Forest Management Act ("NFMA"), and the Travel Management Rule. After Chief District Court Judge Michael Mosman granted Defendants' motion for summary judgment, Plaintiffs sought an injunction pending appeal. Judge Mosman issued an order denying the injunction on June 3, 2019 and released this opinion establishing the basis for the summary judgment decision on June 18.

The dispute revolved around the Forest Service's authorization of the Crystal Clear Restoration ("CCR") Project, which was projected to yield double the normal annual timber production in the MHNF. The Project also involved the thinning of nearly 12,000 acres, which included Northern Spotted Owl habitat and White River Late Successional Reserve Forest. The CCR and The Forest Service's stated objective for the CCR Project was to "improve stand conditions, reduce the risk of high-intensity wildfires, and

promote safe fire suppression activities," as well as make the remaining forest more resistant to disease and insect infestations. The Forest Service issued an Environmental Assessment ("EA") that evaluated the proposed thinning and a no action alternative; the Agency did not find substantial questions concerning the potential impacts existed to warrant a full Environmental Impact Statement. Based on the EA, the Forest Service published a Finding of No Significant Impact and approved the CCR Project.

In moving for summary judgment, the Plaintiffs first alleged that the Forest Service's decision was arbitrary and capricious as the EA did not adequately consider the significant impacts of the CCR Project. Federal regulations evaluate the significance of a project's impacts in terms of both the context, the setting in which intensity is evaluated, as well as the intensity, the severity of impacts. Plaintiffs focused on the issue of intensity, arguing that the CCR Project involved controversial and uncertain effects in addition to impacting threatened species and ecologically critical areas.

In evaluating these assertions, Judge Mosman began by finding that the appropriate context "extend[s] at least as far as the boundaries of the MHNF for some of the intensity factors" and the project area for other factors. Despite some evidence undermining the Forest Service's findings, the geographic scale of the actions and impacts led Judge Mosman to conclude the Forest Service had adequately considered the potential effects. Further, the deference given to agencies in scientific and technical matters supported the Forest Service's ultimate conclusion that the potential impacts did not warrant an EIS.

With regard to the NFMA claims, Plaintiffs alleged the CCR Project did not comply with the Northwest Forest Plan and the MHNF Plan. Specifically, Plaintiffs asserted that the CCR Project contravened the Plans' restrictions and procedures for actively managing late successional forests and the requirement to retain dead standing trees. Again relying on the limited comparative geographic scope of the impacts and agency deference, Judge Mosman found in favor of the Forest Service.

Lastly, Plaintiffs argued that the Forest Service violated the Travel Management Rule because the Agency did not identify of a Minimum Road System ("MRS") that fosters the decommissioning of underused roads. Plaintiff maintained that evaluating the MRS should occur as part of the NEPA analysis. Judge Mosman disagreed, finding "no statutory basis for requiring the USFS to identify a [MRS] as part of the CCR Project." While the Forest Service may incorporate such a plan into a landscape level project it also has the discretion to identify an MRS as a stand-alone proposal.

9th Circuit

1. ***Ctr. for Biological Diversity v. Ilano***, No. 17-16760, 2019 U.S. App. LEXIS 18717 (9th Cir. June 24, 2019). *Author: Dan Hytrek of National Oceanic and Atmospheric Administration Office of the General Counsel.*

The Ninth Circuit Court of Appeals affirmed the district court's grant of summary judgment in favor of the Forest Service in plaintiffs (Center for Biological Diversity and Earth Island Institute) challenge alleging that the Forest Service violated the National Environmental Policy Act ("NEPA") when it designated 5.3 million acres in California as a landscape-scale area under the Healthy Forests Restoration Act ("HFRA") without preparing an Environmental Impact Statement ("EIS") or Environmental Assessment ("EA") and approved the Sunny South Project concluding that it was categorically excluded from NEPA compliance.

In 2015, the Forest Service designated 5.3 million acres in California, including lands within the Tahoe National Forest, as a landscape-scale area based on criteria under the HFRA related to declining forest health; risk of substantially increased tree mortality; and imminent risk to public infrastructure, health, or

safety from the risk of hazard trees. The Ninth Circuit concluded that this designation did "'not change the status quo.'" 2019 U.S. App. LEXIS at *10 (quoting Northcoast Envtl. Ctr. v. Glickman, 136 F.3d 660, 668 (9th Cir. 1998). The designation did "not mark the commencement of any particular projects; it only identifies swaths of land suffering from the harms of insect or disease infestation where certain priority projects may be implemented." Id. at *10-11. Therefore, the designation did not "trigger a NEPA analysis." Id. at *11.

The Sunny South Project authorized tree thinning and prescribed burning to address pine-beetle infestation that was spreading in an area of the Tahoe National Forest within the landscape-scale area designated under the HFRA. In 2016, the Forest Service approved the project and concluded that it was categorically excluded from NEPA analysis under the HFRA, because there were no extraordinary circumstances preventing the application of the categorical exclusion. Plaintiffs challenged the Forest Service's conclusion based on the project's potential impact on the California spotted owl. The Ninth Circuit noted, "[t]he Forest Service identified the California spotted owl as a sensitive species within the project area, and examined whether the project had any significant environmental effects on the species." Id. at *16. The Forest Service concluded that the project would have limited short-term effects on the species, and the species would benefit in the long run from habitat improvement due to the project. The Ninth Circuit concluded that the Forest Service's conclusion that the project did not involve extraordinary circumstances was not arbitrary and capricious, because "the Forest Service considered relevant scientific data, engaged in a careful analysis, and reached its conclusion based on evidence supported by the record." Id. at *18.

2. ***Or. Natural Desert Ass'n v. Rose***, 921 F.3d 1185 (9th Cir. Apr. 25, 2019). *Author: Dave Becker, Law Office of David H. Becker, LLC. Mr. Becker, who served as co-counsel to the Oregon Natural Desert Association in this appeal.*

This case involved a challenge to two decisions by subdivisions of the U.S. Department of the Interior related to the designation of roads and travel management on Steens Mountain in southeastern Oregon. Steens Mountain is a unique natural area, nearly 50 miles long from north to south, sloping gently from west to east to a high point of 9,733 feet before dropping over a mile to the Alvord Desert below. In 2000, Congress designated the 428,156-acre Steens Mountain Cooperative Management and Protection Area ("CMPA") and provided that the Bureau of Land Management ("BLM") should manage the CMPA "to conserve, protect, and manage the long-term ecological integrity of Steens Mountain." 16 U.S.C. § 460nnn-12. The Steens Act also directs BLM to prepare a "comprehensive transportation plan" governing driving and road maintenance within the Steens Mountain CMPA. Id. §§ 460nnn-21(b), -22(a).

The case had a long history, beginning with BLM's preparation of an Environmental Assessment ("EA") in 2007 for the Steens Mountain Travel Management Plan ("Travel Plan"), and its designation that same year of 555 of the 556 miles of routes it identified on Steens Mountain as open to driving and mechanical maintenance. BLM asserted that such designation would have no significant impact on the environment. However, the Oregon Natural Desert Association ("ONDA") had conducted extensive route field and photographic surveys and identified over 200 miles of routes that are either non-existent on the ground (and thus existed only on a map) or are so obscure or primitive that driving on them, or mechanically maintaining them, would cause significant harm to the ecological integrity of Steens Mountain.

ONDA therefore challenged BLM's 2007 decision, and in 2011 obtained summary judgment in its favor and a remand to the Department of the Interior Board of Land Appeals ("IBLA"). The federal defendants introduced new evidence regarding the designated routes before IBLA without, however, making this evidence available for public review under the National Environmental Policy Act ("NEPA").

In 2014, IBLA upheld BLM's 2007 decision in all respects, and ONDA challenged the IBLA's decision as the final agency action of the Department of the Interior. However, in 2015, BLM reopened a small segment of the designated route network for additional public comment, and issued a second EA for the Steens Mountain Comprehensive Recreation Plan ("Recreation Plan"), which BLM finalized that same year—and which ONDA also challenged.

This district court denied ONDA's motion for summary judgment as to both its challenge to the 2014 IBLA decision on the Travel Plan and the 2015 BLM decision on the Recreation Plan. On appeal, however, the Ninth Circuit agreed with ONDA that the IBLA and BLM decisions were arbitrary and capricious and violated NEPA.

The Ninth Circuit held that IBLA acted arbitrarily and capriciously by changing its definition of "roads and trails" without providing a reasoned explanation for the change. For decades, BLM and the Department of the Interior had defined a "road" as a route that was "maintained by mechanical means to insure relatively regular and continuous use." In 2014, however, IBLA reversed this long-standing understanding of what a "road" was and ruled that it was permissible to designate a road even if it "exists" only on a map—even though it had faded back into the landscape and was no longer visible on the ground. The change of course, without explanation, violated the agency's obligation to provide a reasoned explanation for its new definition.

The Ninth Circuit also held that IBLA and BLM violated the obligation under NEPA to establish the baseline conditions of the routes on Steens Mountain before they approved the Travel Plan and Recreation Plan. The agency had even acknowledged that it designated some routes as open even though the BLM staff could not find the routes on the ground. The Court of Appeals explained that—because the mechanical maintenance authorized in these Plans could "dramatically change a lightly used route and its surroundings"—the agency "could not properly assess the environmental impact of allowing motorized travel on more than 500 miles of routes, or of carrying out mechanical maintenance on those routes" without understanding the actual condition of the routes on the ground.

The Court held that the route analysis forms that BLM had submitted to the IBLA after 2011 could not constitute a proper baseline under NEPA because they were not made available for public review and comment—and also that additional photographs that BLM attached to route analysis forms after public comment on the Recreation Plan EA was closed could not cure deficiencies in that EA's failure to establish baseline conditions, because, again, they were not made available to the public during the NEPA process.

Because the Court vacated the Travel Plan and Recreation Plan, and remanded to BLM for preparation of a lawful NEPA analysis and reconsideration of the Travel Plan, the Court of Appeals did not decide ONDA's substantive challenges under the Federal Lands Policy and Management Act or the Steens Act, and also did not order BLM to prepare an Environmental Impact Statement. The Court did, however, vacate an award of costs in favor of the federal defendants, and taxed costs on appeal in favor of ONDA.

On June 10, 2019, ONDA filed a petition for panel rehearing, asking the Court of Appeals to convert an injunction pending appeal that the Court had entered on June 28, 2018, into a permanent injunction pending BLM's issuance of a lawful Travel Plan decision. The injunction, which was originally entered by the district court in 2011 and later expanded, prohibits or limits maintenance and motorized use on about 121 miles of obscure or non-existent routes. A decision on this petition for panel rehearing is expected later this summer.

3. ***Western Watersheds Project v. Grimm***, 921 F.3d 1141 (9th Cir. Apr. 23, 2019). *Author: Matthew Query of Yockim Law.*

This case was brought by environmental groups seeking to enjoin Wildlife Services from continuing wolf culling activities until additional National Environmental Policy Act ("NEPA") analysis was completed. Western Watersheds Project, Center for Biological Diversity, Friends of the Clearwater, WildEarth Guardians, and Predator Defense (collectively, "Plaintiffs") filed a lawsuit against the U.S. Department of Agriculture's Wildlife Services ("Defendant") in the U.S. District Court of Idaho, alleging a failure to prepare an environmental impact statement ("EIS") regarding grey wolf management in Idaho, in violation of NEPA. The lower court issued an order granting Defendant's motion for summary judgment in January, 2018 on grounds that Plaintiffs lacked standing. Plaintiffs' appealed, and on April 23, 2019, the Ninth Circuit ruled in favor of Plaintiffs, reversing and remanding the case for further proceedings. The Ninth Circuit's opinion in this case is primarily just a relatively brief standing analysis, with particular focus on injury and redressability.

At the District Court, Plaintiffs claimed Defendant violated NEPA in four ways: (1) failing to prepare an EIS, (2) failing to take a "hard look" at the effects of actions and alternatives; (3) arbitrarily deciding not to supplement the NEPA analysis; and (4) failing to supplement the 2011 environmental assessment ("EA") failure to supplement the NEPA analysis amounted to a unlawfully withholding and/or unreasonably delaying an action. On a motion for summary judgment, District of Idaho Judge Edward J. Lodge ruled in favor of Defendant, on grounds that Plaintiffs failed to demonstrate redressability, and, as such, lacked standing.

The Ninth Circuit's standing analysis was relatively straightforward, and ultimately somewhat brief. Noting a plaintiff's burden to establish Article III standing pursuant to Salmon Spawning & Recovery All. v. Gutierrez, 545 F.3d 1220 (9th Cir. 2008), the Court reiterates the requirements that, to do so, a plaintiff must show (1) a concrete and particularized injury which is actual or imminent, (2) the injury is traceable to the challenged conduct, and (3) that the injury is likely to be redressed by a favorable court decision. Lujan v. Defs. Of Wildlife, 504 U.S. 555, 560-61 (1992).

With respect to injury, the Court notes eight declarations from Plaintiffs' members in the record, describing how Wildlife Services' wolf-culling management program threatens their aesthetic and recreational interests in tracking and observing wolves in the wild. Based on these declarations, the Court notes the interests establish an injury-in-fact and fall under the scope of NEPA's protections. With respect to redressability, the Court asks whether Plaintiffs have shown that halting Wildlife Services wolf-culling management program pending additional NEPA analysis could protect their aesthetic and recreational interests in tracking and observing the grey wolf in Idaho. Here, the Court notes Defendant's primary argument below, which is essentially that Plaintiffs enjoy no potential for redress given the state wildlife agency's ("IDFG") intent, and ability, to continue culling wolves to meet its management objectives. In support of Defendant's redressability argument, it pointed the District Court to a letter from IDFG to Wildlife Services which stated that IDFG would conduct its own wolf removal efforts to protect ungulates, if Defendant were unwilling to do so itself. The Ninth Circuit found this letter nondescript and unspecific enough to defeat Plaintiffs' redressability, noting that the letter did not specifically state IDFG's intent to "kill" wolves to protect livestock and other domestic animals, nor did it explain its plan or demonstrate its capacity to compensate for the loss of the federal services. Because of that lack of specificity, the Ninth Circuit held that the lower court had erred in its redressability analysis. As such, the case was reversed and remanded back to the District Court for further proceedings.