ENR Case Notes, Vol. 39

Recent Environmental Cases and Rules

Environmental & Natural Resources Section — Oregon State Bar
Chris Thomas, Editor — March 2020

Editor's Note: This issue contains selected summaries of cases issued in October, November, and December of 2019 as well as January 2020.

A special thank you to our talented contributors for their summaries: Matthew D. Query of Yockim Carollo LLP; Alexa Shasteen of Marten Law; Ryan Shannon of the Center for Biological Diversity; Connie Sue Martin of Schwabe, Williamson, and Wyatt; Sadie Normoyle of Lewis & Clark Law School; and Brodia Minter of Klamath Siskiyou Wildlands Center.

If you are interested in summarizing cases or rules, please contact the editor.

Chris Thomas, cthomas@thefreshwatertrust.org

Ninth Circuit

1. ***Juliana v. United States***, 947 F.3d 1159 (9th Cir. Jan. 17, 2020)
2. ***Columbia Riverkeeper v. Wheeler***, 944 F.3d 1204 (9th Cir. Dec. 20, 2019)
3. ***Safer Chems, Healthy Families v. U.S. Envtl. Protection Agency***, 943 F.3d 397 (9th Cir. Nov. 15, 2019)
4. ***Pit River Tribe v. Bureau of Land Mgmt.***, 939 F.3d 962 (9th Cir. Sept. 19, 2019)

Oregon State Court

1. ***Cascadia Wildlands v. Or. Dep't of Fish & Wildlife***, 300 Or. App. 648, 455 P.3d 950 (Or. Ct. App. Nov. 27, 2019)
2. ***Linn County v. Or. Dep't of Forestry***, No. 16CV07708 (Linn Cnty. Cir. Ct. Nov. 20, 2019) (jury trial)

Ninth Circuit

1. *Juliana v. United States*, 947 F.3d 1159 (9th Cir. Jan. 17, 2020).
Author: Matthew D. Query of Yockim Carollo LLP.

This Ninth Circuit opinion represents the most recent ruling on a civil rights action brought against the United States by a group of twenty-one young American citizens, the nonprofit organization Earth Guardians, and Dr. James Hansen, acting as "representative of future generations" ("Plaintiffs"). A brief review of the background of the case and the decisions made by the trial court is helpful in illustrating the Circuit Court's review thereof.

Plaintiffs initiated the action in Oregon District Court, seeking declaratory and injunctive relief against the United States, the President, and several federal agencies ("Defendants"), alleging that greenhouse gas emissions from carbon dioxide, produced by the burning of fossil fuels, was destabilizing the climate system in a way that would "significantly endanger plaintiffs, with the damage persisting for millennia." Plaintiffs claimed that Defendants' actions violated their substantive due process rights to life, liberty, and property, as well as alleging, under the public trust doctrine, that Defendants violated their obligation to hold certain natural resources in trust for the people and for future generations. Through two separate opinions issued two years apart (one denying Defendants' motion to dismiss, the other dealing with Defendants' motions for judgment on the pleadings and summary judgment), the District Court conducted a comprehensive analysis of Plaintiffs' Article III standing, substantive due process claims, and the claims brought under the public trust doctrine. As a result of these two opinions, taken together, the Court made a number of rulings pertaining to the Plaintiffs' claims and Defendants' challenges thereto.

Pursuant to the District Court's interpretation of the standing requirements set forth in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), the District Court ruled that, on the pleadings, (A) Plaintiffs had alleged a concrete, particularized, and imminent injury in fact; (B) Plaintiffs had adequately alleged a causal link between Defendants' conduct and the asserted injuries; and (C) Plaintiffs had adequately articulated a form of relief that would at least partially redress their asserted injuries. With respect to the Plaintiffs' Fifth Amendment due process claims, the District Court found that the right to a climate system capable of sustaining human life is a fundamental right protected by substantive due process, and that Plaintiffs had adequately alleged infringement of a fundamental right.

With respect to the claims brought under the public trust doctrine, the District Court carried what could be the most substantive review ever conducted by a federal court on the competing perspectives over the viability of public trust claims against the federal government. The District Court found it unnecessary to determine whether the atmosphere qualified as a public trust asset (which, Defendants contended, it did not) and ruled that Plaintiffs had adequately alleged violations of the public trust doctrine with respect to the twelve miles of territorial sea and the lands submerged thereunder. After reviewing the parties' adverse positions regarding whether or not the public trust doctrine was a matter of state law and/or whether the doctrine applies to the federal government, the District Court ruled that Plaintiffs' federal public trust claims are cognizable in federal court.

Finally, in the second of the two opinions, the District Court issues the only ruling against the Plaintiffs' actual claims—having denied virtually all of Defendants' other substantive arguments within their various motions—when it ruled Defendants were entitled to summary judgment on Plaintiffs' freestanding claim under the Ninth Amendment. Citing Strandberg v. City of Helena, 791 F. 2d 744 (9th Cir. 1986), the District Court held that the Ninth Amendment has never been recognized as independently securing any constitutional right, for purposes of pursuing a civil rights claim.

After initially denying certification for interlocutory appeal, on reconsideration, the District Court certified the case for appeal and stayed all proceedings pending a decision by the Ninth

Circuit. The case was argued and submitted to the Ninth Circuit on June 4, 2019, and the Ninth Circuit filed an opinion January 17, 2020.

The Ninth Circuit focused on a number of matters in its review, and made the following conclusions. First, with respect to Defendants argument that Plaintiffs claims could only proceed, if at all, under the Administrative procedures Act ("APA"). The Circuit Court rejected this argument, noting that nothing prevents Plaintiffs from bringing an equitable action to enjoin unconstitutional conduct of a federal agency. The Circuit Court then reviews the Article III standing determinations of the District Court, finding that "at least some" of Plaintiffs claims are concrete and particularized injuries, and that with respect to causation, Plaintiffs sufficiently raised genuine issues of material fact as to the agency policies alleged to be the source of causation. As such, two of the three elements of Article III standing had been established.

With respect to the third element of Article III standing—redressability—the Ninth Circuit disagrees with the District Court. Focusing on Plaintiffs' sole claim for declaratory and injunctive relief for the government's deprivation of their substantive constitutional right to a "climate system capable of sustaining human life," the Ninth Circuit finds it to be outside the power of an Article III to provide. The Ninth Circuit then notes that Plaintiffs' experts had failed to show that "even [] total elimination of the challenged programs would halt the growth of carbon dioxide levels in the atmosphere, let alone decrease that growth[,]" as well as noting that none of Plaintiffs' experts contend that "elimination of the challenged pro-carbon fuels programs would by itself prevent further injury to the plaintiffs. Rather, the record shows that many of the emissions causing climate change happened decades ago or come from foreign non-governmental sources." Id. at 1170. Ultimately, the Ninth Circuit reverses the District Court's holding with respect to the redressability prong of establishing standing, holding in conclusion that an Article III court will not have the requisite authority to determine the sufficiency of, supervise, or enforce the climate change mitigation plan that Plaintiffs' redress would require.

In conclusion, the Ninth Circuit reverses the two orders of the District Court, remanding the case with instructions to dismiss for lack of Article III standing.

2. ***Columbia Riverkeeper v. Wheeler***, 944 F.3d 1204 (9th Cir. Dec. 20, 2019).
   Author: Alexa Shasteen of Marten Law.

Columbia Riverkeeper, Idaho Rivers United, Snake River Waterkeeper, Inc., Pacific Coast Federation of Fishermen's Associations, and the Institute for Fisheries Resources ("Plaintiffs") sued the U.S. Environmental Protection Agency ("EPA") under the federal Clean Water Act's ("CWA") citizen-suit provision, asserting that because Oregon and Washington had failed to develop temperature "total maximum daily loads" for the Columbia and Snake Rivers, the CWA required EPA to do it instead. They won.

Statutory Framework

The CWA, passed in 1972, required states to identify "impaired waters" (also called "water quality limited segments") that are contaminated by a specific pollutant, like aluminum or arsenic, or a condition such as temperature or turbidity. States then had to rank their impaired waters by priority on so-called "§ 303(d) lists." For each pollutant in each impaired water

segment, a state must develop and submit to EPA a total maximum daily load ("TMDL") that sets the maximum amount of the pollutant that the segment can receive without exceeding the applicable water quality standard. Within 30 days of a state's submission, EPA must approve the TMDL or disapprove the state's TMDL and issue a new one in its place.

Procedural History

The original deadline for states to submit their § 303(d) lists and TMDLs to EPA was in 1979. Like many states, Oregon and Washington missed the deadline by over a decade and did not even submit their § 303(d) lists to EPA until the 1990s, at which point they still did not have functioning TMDL programs. Oregon and Washington's § 303(d) lists identified segments of the Columbia and Snake Rivers as water quality limited for temperature.

In 2000, Oregon and Washington entered into an agreement with EPA whereby EPA would produce the Columbia and Snake River TMDL for them. After a bit more administrative wrangling, EPA published a draft TMDL in July 2003, which stated that a final TMDL would be issued after the 90-day public comment period. Since publication of the draft TMDL, neither state nor the EPA has made any progress on finalizing the TMDL, although both states have developed TMDL programs and issued over 1,000 other TMDLs. Both states maintain § 303(d) lists with target dates for completing their remaining TMDLs, but neither list includes the Columbia and Snake River temperature TMDL.

In early 2017, Plaintiffs sued to compel EPA to issue a final TMDL to protect salmon and trout, which can be harmed or killed when river water gets too warm. The summer of 2015 illustrated the problem: that year, an estimated 250,000 Snake River sockeye salmon died before they could spawn. The district court granted Plaintiffs' motion for summary judgment and ordered EPA to issue a final TMDL. EPA appealed and sought a stay, which the court granted.

Legal Analysis

The CWA does not specify what happens if a state fails to develop a TMDL as required. However, the Ninth Circuit in the "BayKeeper" case held "that where a state has 'clearly and unambiguously' decided that it will not submit TMDLs for the entire state, that decision will be 'construed as a constructive submission of no TMDLs, which in turn triggers the EPA's nondiscretionary duty to'" issue a TMDL. Columbia Riverkeeper v. Wheeler, No. 18-35982, 2019 WL 6974376, at *4 (9th Cir. Dec. 20, 2019) (quoting San Francisco BayKeeper v. Whitman, 297 F.3d 877, 883, 880 (9th Cir. 2002)). Several other circuits have reached the same conclusion.

Here, EPA argued that BayKeeper only requires EPA to issue TMDLs if a state completely refuses to issue any TMDLs for the whole state. The Ninth Circuit rejected that argument, stating that "our holding in BayKeeper does not limit the application of the constructive submission doctrine to a wholesale failure by a state to submit any TMDLs. Such a limitation is not supported by either the language and purpose of the CWA or the logic of our case law." The Court observed that the CWA's purpose—"to restore and maintain the chemical, physical, and biological integrity of the Nation's waters"—"would be dramatically undermined if we were to read into § 1313(d)(2) a loophole by which a state, and by extension the EPA, could avoid its statutory obligations by a mere refusal to act." The Ninth Circuit's conclusion is consistent with other circuits' decisions.

The Ninth Circuit agreed with the district court's finding that "Washington and Oregon have clearly and unambiguously indicated that they will not produce a TMDL for these waterways." Therefore, the Court ordered EPA to issue a final TMDL within 30 days of its December 20, 2019 decision.

Conclusions and Implications

The Court's decision in this case represents a major victory for environmental advocacy groups in their multi-pronged legal and political effort to rehabilitate the Pacific Northwest's imperiled anadromous fish populations and the endangered southern resident orcas that depend on them. Coincidentally, the Ninth Circuit's ruling came out on the same day as a draft report from Washington Gov. Jay Inslee's office analyzing arguments for and against breaching the four lower Snake River dams, which contribute to warm temperatures in the river (the report, however, does not actually make a recommendation one way or the other). Dam removal or changes in flow regimes could have significant impacts on the region's economy; dams provide irrigation water and access to barge shipping as well as hydroelectric power. December's decision does not represent the final word on the matter, however. The panel granted EPA's motion for an extension of time to file a petition for rehearing; the petition is due in March 2020.

3. ***Safer Chems, Healthy Families v. U.S. Envtl. Protection Agency***, 943 F.3d 397 (9th Cir. Nov. 15, 2019). *Author:* Ryan Shannon of the Center for Biological Diversity.

In *Safer Chems. v. U.S. E.P.A*, environmental groups and other organizations challenged the "Risk Evaluation Rule" ("Rule") promulgated by the Environmental Protection Agency ("EPA") pursuant to the Toxic Substances Control Act ("TSCA") establishing a process to evaluate the health and environmental risks of chemical substances. 943 F.3d 397, 405 (9th Cir. 2019). Specifically, the environmental groups argued (1) that TSCA requires EPA to evaluate risks associated with a chemical's uses collectively before determining that the chemical is safe; (2) that EPA must consider all of a chemical's conditions of use in that evaluation; and (3) that, when considering conditions of use, EPA must evaluate past disposals of all chemicals, as well as the use and subsequent disposal of chemicals not currently or prospectively manufactured or distributed for that use. *Id.* The panel held that the environmental groups lacked standing on their first challenge, failed on the merits of their second, but granted in part their third.

The environmental groups argued that TSCA required EPA to evaluate risks from uses of a chemical substance collectively, and that the Rule contradicted this mandate. *Id.* at 409–10. In essence, they argued that rather than look at individual uses of a chemical in isolation, EPA was required to consider the chemical's use holistically. *Id.* The panel held that this challenge was not justiciable because petitioners' interpretation of what the EPA intended to do and the environmental groups' resulting theory of injury were too speculative because they were dependent upon harm caused by a failure to assess all conditions of use together, and it was uncertain whether EPA ever planned to do what petitioners feared.[1] *Id.* at 413–16.

[1] However, both EPA and the panel acknowledged that environmental groups would be able to challenge a later specific improper risk determination. *Safer Chems.*, 943 F.3d at 415–16.

The environmental groups also argued that the Rule's expressed an impermissible intent to exclude some conditions of use from the scope of a risk evaluation, thereby contravening TSCA's requirement that EPA consider all of a chemical's conditions of use. *Id.* at 416. With respect to their challenge to language in the preamble to the Rule, the panel held that it was not final agency action, and thus not reviewable under the Administrative Procedure Act, because it did not demonstrate an express intent to bind the agency. *Id.* at 416–18.[2] With respect to their challenges to specific provisions of the Rule, the panel held that the challenges were justiciable final agency action. *Id.* at 418, n. 12. The panel further held that they had standing to challenge these provisions, and that the challenge was ripe. *Id.* at 418–19. The panel concluded that the Rule's scope provisions failed on the merits because the challenged provisions did not in fact assert discretion to exclude conditions of use from evaluation. *Id.* at 419–20.

Finally, petitioners challenged EPA's categorical exclusion of legacy activities from the definition of "conditions of use."[3] *Id.* at 420. The panel held that this claim was justiciable. *Id.* at 421–422. Turning to the merits, the panel held that at *Chevron* step one EPA's exclusion of legacy uses and associated disposals contradicted TSCA's plain language, but that EPA's exclusion of legacy disposals did not. *Id.* at 424–426.

4. ***Pit River Tribe v. Bureau of Land Mgmt.***, 939 F.3d 962 (9th Cir. Sept. 19, 2019).
   Author: Connie Sue Martin of *Schwabe, Williamson, and Wyatt.*

In the most recent chapter of the Pit River Tribe's challenge of federal agency administration of geothermal leases, the 9th Circuit Court of Appeals held that §1005(a) of the Geothermal Steam Act (GSA), which permits an unproven geothermal lease to continue for up to forty years if it produces, or is shown to be capable of producing, geothermal steam in commercial quantities during its primary ten-year term, cannot be granted to all leases in a management unit where any one lease becomes commercially productive. The court rejected the Bureau of Land Management's (BLM) argument that §1005(a) allows production-based continuations to be granted to all leases in a management unit if any one of them satisfies the production requirement during the primary term.

The GSA, 30 USC §§ 1001-1028, was enacted "to promote the development of geothermal leases on federal lands." Geo-Energy Partners-1983 Ltd. v. Salazar, 613 F.3d 946, 949 (9th Cir. 2010). Geothermal resources include "the heat or energy found in steam, hot water, or geothermal formations." 30 USC §1002(c)(iii). Section 1005(a) of the GSA provides that geothermal leases on federal land have primary lease terms of ten years.

A geothermal lease is "unproven" if BLM has not determined that it is capable of producing geothermal steam in commercial quantities. See Pit River Tribe v. Bureau of Land Mgmt., 793 F.3d 1147, 1149-50 (9th Cir. 2015) (Pit River III). If a lease is "proven" – i.e., if geothermal

[2] There is an informative discussion throughout the opinion regarding when language contained within a rule's preamble binds the agency and therefore may be challenged, and the extent to which preamble language informs a court's interpretation of the regulation itself.

[3] "Legacy uses" are defined as the "circumstances associated with activities that do not reflect ongoing or prospective manufacturing, processing, or distribution;" "associated disposal" is defined as "disposals from such uses[;]" and "legacy disposal" covers the "disposals that have already occurred[.]" 82 Fed. Reg. at 33,729.

steam is produced in commercial quantities during the primary ten-year term, or shown to be capable of producing geothermal steam in commercial quantities – the GSA allow the lease to be continued for as long as geothermal steam is produced in commercial quantities, not to exceed an additional forty years. 30 USC §§1005(a), (d).

At the end of the first forty-year term, the lessee has a preferential right of renewal for a second forty-year term if geothermal steam is still being produced in commercial quantities and the land is not needed for other purposes. 30 U.S.C. § 1005(b). Thus, a lessee could theoretically tie up federal land for 90 years (primary term of 10 years + 40-year continuation + 40-year renewal).

A different section of the GSA authorizes the Secretary of the Interior to approve cooperative or unit plans to manage multiple geothermal leases as a single unit. 30 USC §1017. And, under §1005(g), any lease that is under an approved unit plan of development or operation, if actual drilling operations were commenced prior to the end of its primary term and are being diligently prosecuted, can be extended for five years at a time.

Pit River and several environmental groups filed suit against the federal agencies responsible for administering twenty-six unproven geothermal leases located in the Medicine Lake Highlands of California. BLM was allowing the continuance of unproven geothermal leases up to forty years under GSA §1005(a) if one lease within a management unit had demonstrated commercial production levels.

BLM argued that allowing unit-wide production-based continuances was justified based on the unitization framework in the Mineral Leasing Act (MLA), 30 USC §§221-236a (1964). The MLA, which governs oil and gas leases on federal lands, allows for an entire oil or gas field to be to be operated as a single entity, without regard to property boundaries. Drilling and production operations on a single lease within a unit are considered to have been performed on all other leases within the unit for purposes of showing that bona fide development efforts have been made and the lease is paying royalties, the trigger for continuation of the lease. 30 USC §226(m). Reading GSA §§1005(a) and (c) together with §1017 with the unitization framework of the MLA allowed for production-based continuances on a unit-wide rather than lease-by-lease basis.

The court disagreed, holding that §1005(a) clearly and unambiguously permits production-based continuations on a lease-by-lease basis only, not on a unit-wide basis. The use of "unit plan" §1005(g) memorialized Congress's intent to make short lease extensions available on a unit-wide basis if leases do not become productive during their primary terms but lease operators can show that drilling has commenced or other bona fide efforts have been made. Congress did not include similar language in §1005(a) and the omission of the term "unit plan" is therefore "imbued with legal significance." In addition, notable differences between the GSA's and the MLA's provisions regarding primary terms prohibited reliance on the MLA's unitization framework.

Oregon State Court

1. ***Cascadia Wildlands v. Or. Dep't of Fish & Wildlife***, 300 Or. App. 648, 455 P.3d 950 (Or. Ct. App. Nov. 27, 2019). *Author:* Sadie Normoyle of Lewis & Clark Law School.

In this case, the Petitioners (Cascadia Wildlands, Center for Biological Diversity, and Oregon Wild) sought judicial review of an amendment to OAR 635-100-0125, which removed the species *Canis lupus*, commonly known as the gray wolf, from the list of protected species under the Oregon Endangered Species Act (OESA). *Cascadia Wildlands v. Or. Dep't of Fish & Wildlife*, 300 Or. App. 648 (2019).

Respondents (Oregon Fish and Wildlife Commission) argued that the petition for judicial review was moot because the legislature enacted Oregon Laws 2016, Chapter 36, which "ratified" the delisting of the wolves as satisfying the elements of ORS 496.176. *Id.* at 650. ORS 496.176 lays out the process for adding or removing a species from the OESA. *Id.* Respondents argued that because Oregon Laws 2016, Chapter 36, precludes judicial review, the court cannot grant the relief the Petitioners sought, and the petition was therefore moot. *Id.*

The Petitioners argued that the decision by the Respondent to delist gray wolves exceeded the Commission's statutory authority, and did not comply with rulemaking procedures which state that a court can only declare a rule invalid if the rule (a) violates constitutional provisions; (b) exceeds the statutory authority of the agency; or (c) was adopted without compliance with the applicable rulemaking procedures. *Id.* More specifically, the Petitioners argued that Oregon Laws 2016, Chapter 3, is "merely an expression of legislative agreement" and does not have legal effect. *Id*. They also argued that even if Chapter 36 has legal effect, the law violates the separation of powers doctrine found in Article III, Section 1, of the Oregon Constitution. *Id.* at 651.

Looking to the Petitioners first argument regarding the legal effect of Chapter 36, they argued that the law was only a "legislative expression of agreement" for three reasons. *Id.* at 654. First, they claimed that the legislature could have amended ORS 496.176 directly to exclude the gay wolf from the OESA, and the fact that they did not indicates that the legislature did not intend for Chapter 36 to be binding, but rather to be a statement of agreement. Second, they argued that passive and indirect text in Chapter 36- Section 1, rendered the provision ambiguous. Third, the Petitioners pointed to legislative history which suggests that the bill was not intended to preclude judicial review. *Id.*

The court addressed each of these arguments in turn, first by looking to the language in Chapter 36. The law states that the delisting was "ratified as satisfying the elements of ORS 496.276." *Id.* at 655. The court stated that the word ratify commonly means "the act of some person or entity giving formal and legally operative effect to another person's or entity's action." *Id.* The court then concluded that when the legislature chose to ratify the delisting, it intended to confirm that the rule delisting the gray wolf legally satisfied ORS 496.176. *Id.* At 656. Ultimately, because Chapter 36 was passed by both houses and signed by the governor, and appears to be a legally binding measure, the legislature intended for the measure to have some legal effect. *Id.*

Turning to the second argument, the court stated that Chapter 36 is clearly directed at the administrative rule delisting the gray wolves, and that it failed to see how passive voice in the law creates ambiguity. *Id.* at 657.

For the final argument, the court again disagrees with the petitioner's assertion that the law was intended to have no legal effect, and to not preclude judicial review. *Id.* The court stated that the legislature intended to give Chapter 36 legislative effect to the commissioner's decision to delist the wolves, so that the decision would be impeded by judicial review. *Id.* at 658. The court looked at legislative history such as statements by various Representatives during committee meetings and floor discussions, and came to the conclusion when looking at the entire legislative record, it was clear that there were concerns about judicial review impeding the ability of Oregon Department of Fish and Wildlife from proceeding with the Oregon Wolf Conservation and Management Plan. *Id.* at 659. Ultimately, the court stated that Chapter 36 ratified the commission's decision to delist, and was "intended to provide the delisting with the legislative effect of precluding moot challenges that assert otherwise." *Id.* at 661.

For the separation of powers argument made by the Petitioners, they claimed that because the legislature did not amend or repeal ORS 496.176, even though it had the authority to do so, Chapter 36 was performing a judicial function, which violates Article III, section 1, of the Oregon Constitution. *Id.* at 662. The court did not agree, stating that the decision to enact Chapter 36 was a policy decision, one which was well within the legislatives plenary power to make. *Id.* at 663. The court further stated that the legislature intended for the commission to take over some of the decision making, as a quasi-legislative process, which is permitted under the powers of separation doctrine. *Id.* at 664.

For the final issue of mootness, the court ruled that the challenge to delisting the gray was moot because the legislature ratified the delisting. *Id.* at 665. This provided the delisting with the statutory effect of removing it from a rule challenge, which in turn meant that a decision by the court regarding the challenge would have no practical effect. *Id.*

2. ***Linn County v. Or. Dep't of Forestry***, No. 16CV07708 (Linn Cnty. Cir. Ct. Nov. 20, 2019) (jury trial).[4] *Author:* Brodia Minter of Klamath Siskiyou Wildlands Center.

Plaintiffs, 14 out of 15 Oregon Forest Trust Land Counties and another 150 underlying taxing districts, filed a class action lawsuit against the state of Oregon. The Plaintiffs claimed that Oregon was in breach of contract, specifically arguing that the Department of Forestry had failed to live up to the contractual agreement embodied in the Forest Acquisition Act of 1941 (the "Act"), which has been unsuccessful in maximizing annual timber sale revenues to counties in which state forest lands are located.[5] Plaintiffs asked a jury in the Linn County Circuit Court to

[4] As a Linn County Circuit Court jury trial, a published opinion is not available. However, a version of the Complaint is available here: www.co.clatsop.or.us/sites/default/files/fileattachments/county_government/page/3891/suit.pdf.

[5] Forest Trust Land Counties are those that transferred forest lands to state control pursuant to the Forest Acquisition Act, Oregon Laws, 1939, Ch. 478; Oregon Laws, 1941, Ch. 236; ORS 530.010 to ORS 530.181. The Plaintiffs maintained that this statute represented a contractual agreement between the Forest Trust Land Counties and the State of Oregon.

interpret whether the state had breached their formal mandate, codified in section 530.050 of the Act, to manage the forests for the "greatest permanent value of such lands to the state."

Plaintiffs argued when county officials deeded over 600,000 acres of clearcut and unproductive forests to the state of Oregon after the Great Depression, the state was contractually obligated to maximize timber profits. Plaintiffs alleged that maximizing timber harvest requires state forests to be managed to the degree privately-owned industrial timber companies manage their lands. Plaintiffs assert the failure for Oregon to do so equates to the breach of a contract formed 80 years ago between counties and the state during a time when the counties lacked resources to manage these lands. In the present day, these lands contain a majority of Oregon's state forests, and as a condition of their transfer, the state agreed to rehabilitate them, protect them from fire, and distribute a portion of timber revenues to the counties.

Defendants argued for a broader interpretation of the phrase "greatest permanent value of such lands to the state" than a solely timber revenue driven approach. Defendants cite a more wholistic authority in the Oregon Administrative Rule revised by the Oregon Board of Forestry in in 1998, "[f]or purposes of achieving the greatest permanent value of these forest lands to the state, the Board may direct the State Forester to: protect these forest lands from fire, disease, and insect pests, sell forest products from these forest lands, execute [valid] mining leases and contracts; and permit the use of these forest lands for other purposes, when such uses are not detrimental to the best interest of the state. These other purposes include, but are not limited to: Forage and browse for domestic livestock; Fish and wildlife environment; Landscape effect; Protection against floods and erosion; Recreation; Protection of water supplies." Or. Admin. R. 629-035-0010(3)(A-F).

However, counties alleged that the broader approach rule change breached their contract and sought 1.4 billion dollars in damages to compensate for past and future lost revenue from timber receipts. In November of 2019, a Linn County Circuit Court jury awarded plaintiffs a total of 1.06 billion dollars, of that 680 million dollars in past damages, with an interest rate of 9%.

A breakdown the 1.06 billion dollar award by county or taxing district is as follows:

PAST DAMAGES: Benton; $509, 858; Clackamas; $25,381,067; Clatsop (districts); $176,478,590; Columbia; $7,551,189; Coos; $32,268,012; Douglas; $8,8455,710; Josephine; $761,707; Lane; $55,025,487; Lincoln; $6,075,056; Linn; $37,476,762; Marion; $9,626,092; Polk; $4,766,551; Tillamook; $246,985,207; Washington; $62,259,582

FUTURE DAMAGES: Benton; $6,161,270; Clackamas; $3,154,360; Clatsop (districts); $109,565,036; Columbia; $7,355,610; Coos; $6,554,882; Douglas; $3,565,736; Josephine; $693,168; Lane; $17,948,504; Lincoln; $14,591,775; Linn; $14,518,637; Marion; $11,552,647; Polk; $3,631,354; Tillamook; $144,113,203; Washington; $48,492,346.

With the interest accruing as incentive to resolve the case, the state is expected to file an appeal in the Oregon Court of Appeals, but such an appeal has not yet been entered.