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Recent Environmental Cases and Rules

Environmental & Natural Resources Section — Oregon State Bar
Chris Thomas, Editor — March 2021

Editor's Note: This issue contains selected summaries of judicial opinions and administrative developments between December 2020 and March 2021.

A special thank you to our talented contributors for their summaries: Sara Ghafouri of the American Forest Resource Council; Sarah R. Liljefelt of Schroeder Law Offices; Ryan Shannon of the Center for Biological Diversity; Lucy Brookham of the Cascade Forest Conservancy; Teryn Yazdani of Crag Law Center; Devon Castorena of Lewis & Clark Law School; Isaac Kort-Meade of the Sandra Day O'Connor College of Law, Arizona State University; and Jeanette Schuster of Tonkon Torp LLP.

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

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Supreme Court

1. ***United States Fish & Wildlife Serv. v. Sierra Club, Inc.***, No. 19-547, __ S. Ct. __, 2021 WL 816352 (U.S. Mar. 4, 2021)
   Author: Sara Ghafouri of the American Forest Resource Council.

On March 4, 2021, the United States Supreme Court decided the issue of whether the deliberative process privilege exemption under the Freedom of Information Act (FOIA) protects from disclosure draft biological opinions prepared by the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NFMS). In a 7-2 decision, the first decision authored by Justice Amy Coney Barrett, the Supreme Court reversed the Ninth Circuit and held that draft biological opinions are protected from disclosure because they are predecisional and deliberative, even if the drafts reflect the agencies' last views about a proposal. Justice Breyer, joined by Justice Sotomayor, dissented.

Background

In 2011, the Environmental Protection Agency (EPA) proposed regulations for "'cooling water intake structures,' which withdraw large volumes of water from various sources to cool industrial equipment." 2021 WL 816352, at *2. The water withdrawn by these structures typically contains fish and other organisms that can become trapped in the intake system and "if the EPA's rule did not adequately guard against this risk, it would jeopardize" listed species protected under the Endangered Species Act (ESA). *Id.* The EPA requested formal consultation with FWS and NMFS (collectively, the Services) pursuant to section 7 of the ESA regarding the regulations potential to cause "jeopardy" to the continued existence of threatened or endangered species. *Id.* at *3. As a result of the consultation, the EPA made changes to the proposed regulations and provided a revised version to the Services in November 2013. The Services provided draft biological opinions in December 2013, which concluded that the proposed regulations would likely jeopardize certain species and identified possible reasonable and prudent alternatives that the EPA can take to avoid violations of section 7(a)(2) of the ESA. The decisionmakers did not approve the draft biological opinions and the Services "shelved the draft opinions and agreed with the EPA to extend the period of consultation." *Id.* The EPA then sent the Services a proposed rule that differed from the 2013 version. The Services issued a joint final biological opinion finding "no jeopardy," and the EPA issued its final rule that same day.

Sierra Club submitted FOIA requests for records related to the Services' consultation with the EPA. The Services invoked the deliberative process privilege for certain documents, 5 U.S.C. § 552(b), including the draft biological opinions. Sierra Club brought a challenge in the U.S. District Court for the Northern District of California over the withheld documents. The district court determined that the documents were subject to disclosure under FOIA. The Ninth Circuit affirmed in part and determined that the draft biological opinions represented "the Services' final opinion that the EPA's 2013 proposed rule was likely to have an adverse effect on certain endangered species." *Id.*

Justice Barrett's Majority Opinion

The majority opinion explained that the deliberative process privilege "distinguishes between predecisional, deliberative documents, which are exempt from disclosure, and documents reflecting a final agency decision and the reasons supporting it, which are not." *Id.* at *4. "Documents are 'predecisional' if they were generated before the agency's final decision on the matter, and they are 'deliberative' if they were prepared to help the agency formulate its position." The majority adopted the argument that a "document is not final solely because nothing else follows it. Sometimes a proposal dies on the vine." *Id.*

The majority opinion provides that courts "must consider whether the agency treats the document as its final view on the matter" in determining whether the "document communicates the agency's settled position." *Id.* at *5. In such circumstances, "the deliberative 'process by which governmental decisions and policies are formulated' will have concluded, and the document will have 'real operative effect'" and will not leave the agency decisionmakers "'free to change their minds.'" *Id.*

The majority found that the deliberative process privilege protects the draft biological opinions at issue because "they reflect a preliminary view—not a final decision—about the likely effect of the EPA's proposed rule on endangered species." *Id.* The majority opinion reasoned that the documents reflect a preliminary view because they were identified by the Services as "drafts," cautioning that the label is not determinative but must be evaluated in the context of the administrative process. The majority noted that the regulatory process distinguishes between draft and final biological opinions and that the framework "contemplates further review by the agency after receipt of the draft, and with it, the possibility of changes to the biological opinion after the Services send the agency the draft." *Id.*

The majority opinion expressly rejected Sierra Club's proposed "effects-based" test. Sierra Club contended that finality hinged on whether the document provoked a response from the EPA. *Id.* at *6. In Sierra Club's view, the draft biological opinions "intended to give the EPA a sneak peek at a conclusion that the Services had already reached and were unwilling to change" and "[o]nce the EPA knew that a jeopardy opinion was coming, it revised its proposed rule." *Id.*

The "real operative effect" test for finality, however, references legal consequences that flow from an agency action. Here, "a final biological opinion leads to 'direct and appreciable legal consequences' because it alters 'the legal regime to which the action agency is subject, authorizing it' to take action affecting an endangered species "'if (but only if) it complies with the prescribed conditions'" and the same is true of a draft biological opinion. *Id.* The majority concluded that "[t]o determine whether the privilege applies, [courts] must evaluate not whether the drafts provoked a response from the EPA but whether the Services treated them as final." *Id.*

To address concerns that the Services may stamp every document as "draft" to protect it from disclosure, Justice Barrett explains the determination of "whether an agency's position is final for purposes of the deliberative process privilege is a functional rather than formal inquiry." *Id.* at *7. The majority opinion warns that "[i]f the evidence establishes that an agency has hidden a functionally final decision in draft form, the deliberative process privilege will not apply." *Id.*

Justice Breyer's Dissent

In the dissent, Justice Breyer distinguishes final biological opinions, draft biological opinions, and draft of draft biological opinions. Justice Breyer provides five reasons why the 2013 draft biological opinions reflect the Services' final decision.

First, "[t]he mere possibility of a future change does not alter the finality, or the final effect, of the original document," noting in "principle, a Service could also change its mind about a Final Biological Opinion, withdrawing a Final Biological Opinion already issued and substituting a new one in its place." *Id.* at *7.

Second, "a Final Biological Opinion and a Draft Biological Opinion finding jeopardy serve the same functions within the formal administrative process" because both explain the Services' findings and set forth "reasonable and prudent" modifications or alternatives. *Id.* at *8. In the dissent's view, the only difference between a draft and final biological opinion is that the "Services must make the Draft Biological Opinion available to the EPA before it issues a Final Biological Opinion." *Id.*

Third, a draft (not final) biological opinion "is the document that informs the EPA of the Services' conclusions about jeopardy and alternatives and triggers within the EPA the process of deciding what to do about those conclusions." *Id.* Justice Breyer notes how uncommon it is for the Services to issue a final biological opinion with a "jeopardy" finding. *Id.* (noting that "out of 6,829 formal consultations" between 2008 and 2015, FWS "issued a [Final Biological Opinion finding] jeopardy" "only twice").

Fourth, "permitting discovery of Draft Biological Opinions under FOIA is unlikely to chill frank discussion within a Service because the Services' staff are already aware that these Drafts may well be made public." Justice Breyer acknowledges how the Services have a "long history" of disclosing draft biological opinions to the public and are required to do so upon request from a private applicant. *Id.* at *8-9 (citing 50 C.F.R. § 402.14(g)(5)).

Fifth, "legal consequences flow from the Services' completion of a Draft Biological Opinion. The Services' regulations state that '[i]f requested, the Service shall make available to the Federal agency [i.e., the EPA] the draft biological opinion for the purpose of analyzing the reasonable and prudent alternatives.'" *Id.* at *9. The regulations provide that once a draft opinion is under review, a final biological opinion may not issue and the draft biological opinion "limit the EPA's set of available options." *Id.*

Given the fact-intensive nature of the question of whether certain documents at issue are draft biological opinions or drafts of draft biological opinions, the dissent would remand to the Ninth Circuit to make that determination and, if the court determines that the documents are drafts of draft biological opinions, conduct a segregability analysis.

Ninth Circuit

1. ***United States v. Lucero***, No. 19-10074, 2021 WL 821948 (9th Cir. Mar. 4, 2021)
   Author: Sarah R. Liljefelt of Schroeder Law Offices.

Defendant Lucero was convicted under Sections 1319(c)(2)(A) and 1311(a) of the Clean Water Act for knowingly discharging a pollutant in violation of the Act when he charged construction companies to dump dirt and debris on lands near the San Francisco Bay. The jury found Defendant guilty and he appealed his conviction to the Ninth Circuit Court of Appeals on several grounds. The Ninth Circuit reversed and remanded for a new trial, finding that the jury instructions failed to make the knowledge element clear, and that the error was not harmless.

Section 1311 of the Clean Water Act prohibits discharges of pollutants into navigable waters without an appropriate permit. Section 1319(c)(2)(A) makes it a felony for anyone to knowingly violate Section 1311 of the Act. The Ninth Circuit analyzed the statutory definitions of "discharge of pollutant," "pollutant," "navigable waters," and "point source" to determine that the statute "prohibits any person from 'knowingly' engaging in the 'addition of any' listed substance 'discharged into water' to 'waters of the United States' 'from any point source.'" *Id*. at *4.

The Ninth Circuit then considered how the phrases "discharged into water" and "waters of the United States" co-exist, holding that the former relates to the substantive element of the crime, while the latter is the jurisdictional element. "Accordingly, for a defendant to 'knowingly' add a pollutant in violation of the Act, he must know that he discharged an enumerated substance from a conveyance, and that the substance was 'discharged into water.'" *Id*. at *6. The Court reasoned that Congress had a broad concern about pollution of all waters when enacting the Clean Water Act, and therefore "waters of the United States" is only a limit on jurisdiction, not a limit on the mental state of the person when discharging a pollutant. Id. at *7. "In sum, the government need not prove that the defendant knew he discharged the pollutant in 'to waters of the United States.' Instead, the knowledge requirement imposed by § 1319(c)(2)(A) compels the government to prove only that a defendant knew he discharged a substance 'into water.'" *Id*.

Next, the Ninth Circuit examined the jury instructions from the trial and determined that the instructions did not state that Defendant had to know the pollutant was "discharged into water." Additionally, "evidence that Lucero knew he discharged into water is both underwhelming and contested." *Id*. at 10. The land at issue looked like dry land, the discharges occurred during July and August, and the area was in the middle of a prolonged drought period. *Id*. Thus, the Court determined that the error was not harmless as the jury could have found that the knowledge element was not proved beyond a reasonable doubt. *Id*.

The Ninth Circuit dismissed the Defendant's challenges made on the basis of the statute being unconstitutionally vague, and that regulations defining "waters of the United States" enacted in 2020 should govern rather than the regulations in effect at the time of the criminal acts. Justice Bade dissented in part from the decision, finding that the mental state should require a defendant to know they are discharging a pollutant into "waters of the United States" rather than into any water.

2. ***Ctr. for Biological Diversity v. Bernhardt***, 982 F.3d 723 (9th Cir. Dec. 7, 2020)
Author: Ryan Shannon of the Center for Biological Diversity.

The panel granted in part, and denied in part, a petition for review brought by plaintiff conservation groups challenging the U.S. Department of Interior's Bureau of Ocean Energy Management (BOEM)'s approval of an offshore drilling and production facility along the coast of Alaska in the Beaufort Sea. The panel vacated BOEM's approval of the project and remanded to the agency for further proceedings.

The site of the Liberty project—the first oil development project fully within federal Artic waters on the Continental Shelf of the United States and home to a remarkable amount of biodiversity including polar bears, whales, seals, sea lions, sea otters, and walruses—is governed by the Outer Continental Shelf Lands Act (OCSLA). Before Hillcorp Alaska, LLC could begin drilling, it had to obtain approval of the project from BOEM. The project's approval was governed by the National Environmental Policy Act (NEPA); the Endangered Species Act (ESA); and the Marine Mammal Protection Act of 1973. Relying on a biological opinion prepared by the U.S. Fish and Wildlife Service (Service) and BOEM's environmental impact statement (EIS), BOEM's Regional Supervisor of Leasing and Plans signed a record of decision approving the Liberty project.

The panel held that it had jurisdiction over plaintiffs' challenge pursuant to OCSLA's jurisdictional provision vesting original jurisdiction in the court of appeals, 43 U.S.C. § 1349(c)(2). This included plaintiffs' challenge to the EIS prepared under NEPA and the biological opinion prepared under the ESA. Because the ESA and OSCLA had conflicting jurisdictional provisions (the ESA providing district court jurisdiction and OSCLA direct review in the Ninth), the court followed the more specific statute—OSCLA.

The panel concluded that BOEM's analysis of the no-action alternative in its EIS (which concluded that the no drilling/no-action alternative would result in *more* greenhouse gas emissions than approving the project) was arbitrary and capricious because it failed to quantify the indirect effects emissions resulting from foreign oil consumption would have on the environment in its EIS as required by NEPA, or, at least, explaining thoroughly why it could not do so and summarizing the research upon which it relied.

The panel also held that the Service violated the ESA by relying upon uncertain, nonbinding mitigation measures. Although such measures covered the agency's independent duties under section 9 of the ESA to not cause any unlawful "take" of polar bears, they did not satisfy the agency's section 7 duty to ensure that the project would not adversely modify polar bear critical habitat in its biological opinion.[1] The panel also found that FWS failed to estimate the Liberty project's amount of nonlethal take of polar bears in its incidental take statement. Because the Service's biological opinion was flawed and unlawful, the panel further concluded that BOEM's reliance on the biological opinion was arbitrary and capricious.

[1] This opinion may impact later consideration of the 2019 amendments to the ESA's section 7 implementing regulations which now do not require mitigation measures to be certain or binding, and instead state that the Service "will give appropriate consideration to any beneficial actions as proposed or taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation. Measures included in the proposed action or a reasonable and prudent alternative that are intended to avoid, minimize, or offset the effects of an action are considered like other portions of the action and do not require any additional demonstration of binding plans." 50 C.F.R. § 402.14(g)(8).

Federal District Courts

1. ***Cascade Forest Conservancy v. Heppler***, No. 3:19-CV-00424-HZ, 2021 WL 641614 (D. Or. Feb. 15, 2021) *Author*: Lucy Brookham of the Cascade Forest Conservancy.

Plaintiff, Cascade Forest Conservancy, filed a lawsuit pursuant to the Land and Water Conservation Fund Act (LWCFA), the Reorganization Plan No.3 of 1946, the National Environmental Policy Act (NEPA), and the Administrative Procedure Act (APA) against Lenore Heppler of the Bureau of Land Management (BLM), Gar Abbas, of the United States Forest Service (USFS), and Ascot USA Inc. and Ascot Resources Ltd.

In 2010 and 2011, Defendant Ascot secured approval from Defendant USFS to drill exploration holes in the Green River Valley. In 2011, Defendant Ascot submitted two Prospecting Permit Applications to drill sixty-three holes at twenty-three pad sites. Defendant Ascot and Defendant BLM each own a 50 percent interest in the mineral estate in the Green River Valley. In 2012, the Defendants USFS and BLM jointly prepared an environmental assessment (EA) for the proposed action and subsequent Decision Notice (DN) and Finding of No Significant Impact (FONSI). Plaintiffs, formerly the Gifford Pinchot Task Force, filed a lawsuit challenging the decision. In 2014, the court agreed in part, vacating the Federal Defendants' decision. In 2015, Federal Defendants prepared a modified EA. Plaintiff asserted the modified EA did not comply with the inadequacies found by the 2014 District Court decision. Federal Defendants further modified the EA in 2017, and in 2018, Defendant USFS released its final DN and FONSI consenting to Defendant Ascot's prospecting. BLM subsequently issued its Decision Record (DR) and FONSI granting Defendant Ascot's permit applications. In 2019 Plaintiff filed suit challenging the Federal Defendants' actions.

First, the court considered whether Defendant USFS violated the LWCFA and the Reorganization Plan when it concluded the project would not interfere with recreation. The Reorganization plan authorizes the Secretary of Interior to permit mineral development on LWCFA lands, provided that the Secretary of Agriculture advises that activities do not interfere with the primary purpose for which the lands were acquired. 5 U.S.C. App. 1 (Reorganization Plan No. 3 of 1946, § 402); 16 U.S.C. § 520. The purpose of the LWCFA is to preserve, develop, and assure the availability of quality outdoor recreation resources to all citizens. 16 U.S.C. § 460l–4. Plaintiff alleged that the noise and activities resulting from the mineral prospecting interfere with the primary purpose for which the lands were acquired. Additionally, Plaintiff alleged Defendant USFS never made an "interference" determination and instead made an "inconsistency" determination using a standard different from that required by the Reorganization Act. The court was not persuaded by the Plaintiff's inconsistency argument, finding that Defendant USFS did not fail to make the required determination that the project would not interfere with recreation. Additionally, the court reasoned that the project did not constitute "interference" based on the project's temporary nature, and therefore did not violate the Reorganization Act and LWCFA. The court, however, did make a point to state that this holding is limited to this specific set of facts and not any temporary project, no matter how significant.

Next, the court considered whether Federal Defendants violated NEPA. NEPA has two main components. First, federal agencies must "consider every significant aspect of the environmental impact of a proposed action" *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87,

97 (1983). Second, NEPA requires that relevant information is available to the public regarding the proposed action's potential environmental impacts. *Citizens Comm. to Save Our Canyons v. U.S. Forest Serv*., 297 F.3d 1012, 1021 (10th Cir. 2002). In this case, Plaintiff alleges six separate NEPA violations: (1) failure to evaluate all reasonable alternatives; (2) failure to adequately consider all cumulative impacts of the proposed prospecting; (3) failure to take a "hard look" at the impact of prospecting on recreation; (4) failure to include a comprehensive groundwater baseline analysis; (5) failure to prepare an EIS; and (6) violation of NEPA's public participation requirement. The court first rejected Plaintiff's reasonable alternatives claim, concluding the EA gave a reasonable explanation for eliminating the alternative that would limit prospecting. Second, the court disagreed with Plaintiff's cumulative impacts claim, concluding that with no proposal for a mine in the project area, there is no basis for Federal Defendants to consider the cumulative impacts. Next, the court concluded that Federal Defendants did violate NEPA by failing to take the requisite "hard look" at the proposed action's impacts on recreation, noting that the EA's analysis was confusing and inconsistent. The court also agreed with Plaintiff that Federal Defendants' groundwater baseline analysis was insufficient, concluding that Federal Defendants failed to take a "hard look" at the project's impacts on groundwater quality. The court did not rule on Federal Defendants' failure to prepare an EIS, and the court was unpersuaded by Plaintiff's public participation argument.

2. ***Friends of Animals v. Sheehan***, No. 6:17-CV-00860-AA, 2021 WL 150011 (D. Or. Jan. 15, 2021) *Author:* Teryn Yazdani of Crag Law Center.

This case was before Judge Aiken in the District Court of Oregon. Environmental plaintiffs Friends of Animals (FOA) brought suit against Federal defendants Greg Sheehan and the U.S. Fish and Wildlife Service (FWS) for the agency's implementation of a large-scale experiment to assess the effects of Barred Owl removal on Spotted Owl site occupancy, reproduction, and survival in collaboration with non-federal landowners. The court ultimately granted summary judgment on all counts in favor of the FWS.

Endangered Species Act Claims

Auer Deference Analysis

Before addressing FOA's ESA arguments in full, the court analyzed whether the FWS' regulatory interpretation was entitled to *Auer* deference. The court ultimately determined that *Auer* deference is appropriate because the regulation at issue, 50 C.F.R. § 17.32(c)(2), is ambiguous and the FWS' determination was not plainly erroneous or inconsistent under the statute. The court further held the Safe Harbor Agreement (SHA) policy does not carry the force of law because it is an interpretive document that does not impose substantive rights against third parties; thus, it cannot resolve the regulation's ambiguities.

Net Conservation Benefit

The court first addressed whether the permits and SHAs can be reasonably expected to provide a "net conservation benefit" as required by the regulatory issuance criteria. 50 C.F.R. § 17.32 (c)(2)(ii). The central issue here is whether obtaining access to private owner's land and survey data to further an experiment in exchange for the authorization of incidental take can be reasonably expected to provide a net conservation benefit. FOA argued gathering information for experimental research in exchange for permitting incidental take cannot result in a net

conservation benefit. Although the court stated the implementing regulations are by themselves ambiguous, it found the regulatory language supported using SHAs with private landowners to establish new testing areas and develop new conservation strategies. Thus, the court found that gathering information on the effectiveness of a conservation strategy is practically synonymous with developing a conservation strategy. Further, it held that an "information benefit" can be sufficient to attain a "net conservation benefit" to satisfy the SHA and permit's regulatory criteria. Because the property owners' voluntary action providing Spotted Owl survey data and land access for Barred Owl removal gave an informal benefit, the property owners' action in SHA constituted a "management activity" under 50 C.F.R. § 17.32(c)(1)(ii). Thus, FWS' actions are lawful because permitting incidental take in exchange for testing and developing a new, innovative conservation strategy fits within the policy and purpose of the regulatory scheme.

Baseline Determination

Next, the court addressed whether the FWS sufficiently described the baseline conditions of the properties subject to the SHAs. The FWS delineated between "baseline" conditions—sites where survey data showed the presence of Spotted Owls in the last three to five years—and "non-baseline" conditions—sites where no residential territorial breeding pairs had been sighted in the area in the last three to five years. The court ultimately found the permits at issue actually go beyond the Safe Harbor policy's recommended protections as they are more restrictive and only authorize incidental take in "non-baseline" sites. Thus, property owners were only authorized to incidentally take Spotted Owls on sites that have not shown the presence of the listed species for the length of time established in each SHA.

FOA challenged the FWS' calculation of the baseline conditions, claiming the Federal defendants violated the ESA by: (1) knowingly basing the baseline determination on the landowners' questionable self-surveys, (2) failing to account for the seasonal, foraging, and dispersal use of the habitat, and (3) disregarding the FWS' own guidance and policy in determining whether Spotted Owls occupied the site. The court rejected these assertions, wholly agreeing that the FWS used the best techniques and information available to calculate baseline conditions. First, the court stated the assertion that the survey data used was spotty and questionable was unpersuasive. The SHA policy allows for the formulation of baseline conditions by incorporating survey data from the involved property owners and the administrative record supported that surveys were the best available technique and information; therefore, the FWS' actions were not plainly erroneous or inconsistent with the regulation. Second, the court stated FWS' use of resident owl populations was proper in establishing baseline because the SHA policy allows baseline conditions to be based on *either* "habitat characteristics" or "population estimates and distribution," or both. Announcement of Final Safe Harbor Policy, 64 Fed. Reg. 32,171, 32,722 (June 17, 1999). The SHA baseline including only resident owls, and not incorporating any observations of Spotted Owls using the area for foraging and dispersal use, does not equate to a failure to accurately identify habitat characteristics and determined area of the enrolled property that can sustain seasonal or permanent use. Because the FWS also accounted for seasonal use in the SHAs and provided additional protections for those uses, the determination was sufficient. Third and finally, the court found the FWS did not err nor disregard its own policy in determining Spotted Owl occupancy in sites. Since the FWS provided additional protections in the SHA if the "unoccupied" sites became reoccupied by nesting Spotted Owl pairs and because the SHA does not qualify any "unoccupied" sites as "abandoned," the baseline determinations were lawful.

Critical Habitat Effects Analysis

FOA's final ESA claim alleged that the FWS failed to consider the cumulative impacts of the incidental take authorization by not analyzing the impacts of private logging on federal land and failed to establish whether the permittees' activities on federal easements required Section 7 consultation. The court quickly dismissed this claim, stating the administrative record provided no evidence that the permits or the private landowners' planned activities would affect state or federal critical habitat. Since no adverse impacts to critical habitat were identified, the FWS was not required to conduct a formal Section 7 consultation and thus sufficiently analyzed the SHA's effects on critical habitat.

National Environmental Policy Act Claim

FOA alleged the FWS failed to supplement its final environmental impact statement (FEIS) because: (1) the FWS did not emphasize that nonfederal landowner participation was "crucial" to the experiment in the 2013 FEIS, (2) the FEIS failed to disclose that SHAs and permits authorize habitat destruction, and (3) the SHAs and permits were connected actions, requiring an aggregated NEPA analysis. The court addressed each assertion, ultimately holding that supplementation of the 2013 FEIS was unnecessary. First, the court found the FWS' failure to merely describe nonfederal landowner cooperation as "crucial" did not warrant a supplemental analysis. While the FWS did not emphasize the need using that exact language, the agency nevertheless contemplated the value of the nonfederal lands and included it in every FEIS alternative. Second, the court found that the authorizations of the SHA and permits did not authorize habitat destruction and did not constitute the "substantial change" necessary to trigger a supplemental analysis. The court noted the SHA and permits merely exempt incidental take on sites where Spotted Owl have not had a presence in the last three or five years; therefore, without permits, the private landowners would still be able to continue their activities on the sites since no listed species would be present. Thus, authorizing incidental take for a private landowner's otherwise lawful activity did not meet the threshold to require supplemental analysis. Finally, the court used the independent utility test to hold that the SHAs and permits are not connected actions for NEPA purposes. *Pac. Coast Fed'n of Fishermen's Ass. v. Blank*, 693 F.3d 1084, 1097–98. The court reasoned that although the 2013 FEIS, SHAs, and permits are all linked to the Barred Owl removal experiments and all benefit each other, each action could exist without the other.

3. ***Western Watersheds Project v. Bernhardt***, No. 1:16-cv-00083-BLW, 2021 WL 517035, (D. Idaho. Feb. 11, 2021) *Author*: Devon Castorena of Lewis & Clark Law School.

Plaintiffs challenge the Bureau of Land Management (BLM) decision to cancel the proposed mineral withdrawal of 10 million acres of federal lands in violation of the National Environmental Policy Act (NEPA), the Federal Land Policy and Management Act (FLPMA), and the National Forest Management Act (NFMA). The District Court of Idaho granted in part on Plaintiffs' motion for partial summary judgment and denied the Defendants' motion for partial summary judgment.

Legal Background

In 2015, fifteen Environmental Impact Statements were challenged by four separate environmental groups, claiming the BLM and Forest Service did not sufficiently analyze lands under their control and failed to protect sage grouse populations. The Trump administration began the process of revising the 2015 Sage Grouse Plans, completing the revisions in 2017. The BLM amended the Sage Grouse Plans, resulting in relaxed restrictions to oil and gas development in sage grouse habitat. In May 2019, Plaintiffs supplemented their original complaint to challenge the BLM's 2019 Plan Amendments.

Factual Background

In 2010, the Fish and Wildlife Service (FWS) determined that under the Endangered Species Act (ESA), the sage grouse is listed as "warranted-but-precluded". This determination revealed there had been a decline since the prior listing of the sage grouse by the FWS in 2005 as "not warranted." The Court agreed with a 2011 report by the National Technical Team (NTT) that concluded sage grouse required additional protection of the priority habitat, the Sagebrush Focal Area (SFA). In 2015, the BLM and Forest Service adopted the Sage-Grouse Plans, acknowledging the recommendations of the NTT findings to protect the declining sage grouse populations from adverse surface impacts, and submitted a request to withdraw 10 million acres of land from areas subject to the Mining Law of 1872.

Statutory Framework

Under the 1872 mining law, all federal public lands are considered open to mining unless withdrawn. The withdrawal process is initiated by submitting a withdrawal application to the Secretary of the Interior, or upon Interior's own proposal. 43 U.S.C. § 1714. NEPA claims are reviewed under the Administrative Procedures Act, which prohibits agency actions from being "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A).

Jurisdictional Challenges

Defendants argue that the Court does not have jurisdiction over Plaintiffs' challenge to the cancellation of the withdrawal application and raise three points: 1) the BLM's cancellation is not a final agency action; 2) the Plaintiffs have not demonstrated standing; and 3) the Plaintiffs' APA claims are not cognizable. An agency action cannot be challenged unless it is "final." 5 U.S.C § 704. Final agency actions must "mark the consummation of the agency's decision-making process" and be an action "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). Here, both of those conditions are met; legal consequences flowed from the BLM's cancellation of the withdrawal application because the Secretary's ability to consider the application was terminated. Accordingly, the BLM's cancellation is a final action subject to judicial review.

To prove standing, a plaintiff must show an injury in fact, traceable to the defendant, and likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Here, the plaintiffs claim that the BLM's cancellation decision poses two future risks to plaintiffs' members: 1) risks to the recreational and aesthetic use and enjoyment of members, and 2) risks to members' opportunities to observe and photograph sage grouse. The Court disagrees with Defendants' contention that for Plaintiffs to state an injury to fact and prove that standing, they must specify a proposed mining project in a specific area that Plaintiffs' members plan to visit. The Court finds that Plaintiffs have sufficiently established an injury in fact, because Plaintiffs' members have definite plans to visit areas affected by the withdrawal cancellation. In addition, information provided by the BLM leads to the conclusion that substantial risk of future harm to Plaintiffs' members' interests. The Court finds that contrary to Defendants' argument, Plaintiffs did not fail to state an underlying statutory violation under 43 C.F.R. § 2310.1–4, and therefore is reviewable on an independent basis.

The BLM's Cancellation Decision

Both parties seek summary judgment of the BLM's withdrawal application. The Court holds that the BLM's cancellation of the withdrawal application will be vacated and remanded to the BLM for further proceedings, because the cancellation decision was arbitrary and capricious. The BLM failed to provide a reasoned explanation for reversing its prior position that the SFA mineral withdrawal was needed. The Court agrees that the record shows that priority habits should be closed to new mining and that the BLM failed to prove why the withdrawal is no longer necessary. "New data" failed to justify the BLM's cancellation of withdrawal because of a discrepancy concerning the proposed affected area impacted by mining operations, a discrepancy which revealed a drastically larger area of impact.

The Court finds that the record shows that the FWS did rely on the proposed withdrawal when making its 2015 finding because the sage grouse listing as a threatened or endangered species was "not warranted at this time." A comment in the administrative record from March 2015 stated specifically that the BLM was aware that SFA's identified would continue to be important to sage grouse protection. The record establishes that mining will cause direct habitat loss within the mining operation's footprint, and functional habitat loss outside of the mining operation's physical footprint, by the removal of vegetation. Furthermore, the record fails to indicate consideration of the impact of mining and exploration on genetic connectivity. The Court decided the cancellation decision is arbitrary and capricious, due to the failure of the Final EIS to address the genetic connectivity concerns. The record also failed to acknowledge the impact of localized mining operations and instead focuses on the impact percentage of the overall withdrawal area.

The Court has determined that Plaintiffs demonstrated that the issue is not moot because the time between the BLM's decision that a withdrawal is no longer necessary and the actual cancellation of the withdrawal is too short of a duration for proper litigation. Additionally, the BLM may decide in the future to not complete the NEPA process and decide to cancel the withdrawal again. The Court therefore vacated BLM's cancellation of the mineral withdrawal remand the BLM for further consideration.

Oregon State Court

1. ***Friends of the Columbia Gorge v. Energy Facility Siting Council***, 367 Or. 258, 477 P.3d 1191 (2020) *Author*: Isaac Kort-Meade of the Sandra Day O'Connor College of Law, Arizona State University.

This case arises out of a dispute over the proper amount of attorney fees to be awarded to the petitioners. In a prior case, petitioners, Friends of the Columbia Gorge, successfully challenged the Energy Facility Siting Council's (Council) rule amending the process for reviewing Requests for Amendments (RFAs) to site certificates. In *Friends of Columbia Gorge v. Energy Fac. Siting Council*, 365 Or. 371, 446 P.3d 53 (2019), the Supreme Court concluded that the Council had failed to comply with ORS 183.335. The petitioners asked for $299,325.64 in attorney fees, and the court ultimately awarded $31,633.

Petitioners prevailed on two challenges in the previous case, which the court here affirms. The first issue was procedural: the Council had failed to substantially comply with the statutory requirement to set out an assessment method for its RFA rules. Here, the court found that the Council's argument that it had substantially complied with the statute, though ultimately rejected by the lower court, was not unreasonable, so petitioners were not entitled to mandatory fees.

The second issue was substantial: the Council had acted without a reasonable basis in law in limiting judicial review of RFA decisions to those who had made public comment during the initial consideration phase. Because the Council's position on this issue had no grounding in statutory or case law, petitioners were entitled to mandatory fees.

Discretionary Fees

The court declined to impose discretionary fees on the Council for the procedural issue. The court considered the statutory factors under ORS 183.497(1). The Council's position was reasonable, and so this factor weighed heavily against awarding discretionary fees. The court also found no evidence that any of the Council's conduct during the rulemaking process would warrant these fees.

Mandatory Fees

Having concluded that petitioners were entitled to mandatory fees based on the substantial issue, the court considered the proper amount of fees to award.

Time. First, the court found that petitioners were only entitled to fees for the work reasonably necessary to challenge the Council's rules of judicial review, not the other claims. The work on this position was sufficiently distinct from other aspects of the case to properly separate it.

Rates. Second, the court found that the in-house attorneys for petitioners were entitled to fees based on the prevailing market rate rather than actual costs expended. The Council argued that using the market hourly rate would result in a windfall for petitioners because in-house attorneys at nonprofits are often paid less than market rate. The court disagreed, instead noting that the market-based approach is more common, easier to apply, and results are predictable. Additionally, this approach ensures that the value of the time "donated" by attorneys to the nonprofit would return to those attorneys and not to the losing party. The court refused to find that the market-based approach was always appropriate for in-house counsel fees, instead leaving discretion in the hands of future judges to decide the reasonable approach.

Application. Having determined that petitioner was entitled to fees at the market rate for the amount of time spent on the judicial review claim, the court calculated the final fees to award. Petitioner had only specifically logged 8.5 hours (out of 660.75 total) on the judicial review issue, but the court found it was reasonable to award 70 total hours based on the difficulty of the claim and the need to prepare a claim for attorney fees.

Dissent

Justice Nakamato dissented from the majority on two issues. Justice Nakamato would award mandatory or discretionary fees based on the procedural issue. The Justice also believed the majority underestimated the amount of fees petitioners should have been awarded based on the substantive issue. Reasoning that the Council acted without a reasonable basis in law on the procedural issue, Justice Nakamato concluded that petitioners should receive fees. The Justice also noted that the majority did not offer much explanation on how it got to the 70 hours determination and would have awarded additional fees.

2. ***McNichols v. Dep't of Fish & Wildlife***, 308 Or. App. 369, 372 (Jan 6, 2021)
   Author: Jeanette Schuster of Tonkon Torp LLP.

This case concerned a third-party challenge to a settlement between the Oregon Department of Fish and Wildlife (ODFW) and a private developer, Canby Development, LLC (Canby Development). The settlement resolved a dispute regarding the use of ODFW's conservation easement by emergency vehicles to access an adjacent private subdivision to be developed by Canby Development. Plaintiff, a resident of the town of Canby, used the walking trails near the conservation easement and feared that the use of emergency vehicles would harm the natural setting of the easement, which he valued. This was a combined proceeding under the Oregon Administrative Procedures Act, ORS 183.310 (ADPA), and the Uniform Declaratory Judgments Act, ORS 28.010.

Under the three-prong standing test of the ADPA set out in *People for Ethical Treatment v. Inst. Animal Care*, 312 Or. 95 (1991), the court found that plaintiff did not have standing to challenge the settlement because plaintiff did not (1) allege any concrete facts to show that the use of emergency vehicles on the conservation easement property altered the character of the easement in such a way as to injure plaintiff's aesthetic interests in the natural setting; (2) identify any statutes to show that the legislature expressly wished to have plaintiff's interests considered; or (3) demonstrate that the settlement will legally affect plaintiff in some way.

Similar to the analysis under the ADPA, the court rejected plaintiff's standing under the Uniform Declaratory Judgments Act because plaintiff could not show that he suffered real or probable injury or impact from the settlement.

The court swiftly dismissed plaintiff's attempt to assert generic taxpayer standing because, again, no actual adverse consequences (in this case, fiscally) had been shown.

It is difficult to tell from this decision whether plaintiff, who represented himself, faltered on faulty pleadings or whether the facts were truly insufficient to establish standing under the two statutes.