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Recent Environmental Cases and Rules

Environmental & Natural Resources Section — Oregon State Bar
Megan Beshai, Editor — April 2022

Editor's Note: This issue contains summaries of recent judicial opinions that may be of interest to members of the Environmental & Natural Resources Section.

A special thank you to our talented contributors for their summaries: Sara Ghafouri, American Forest Resource Council; Dan Hytrek, NOAA Office of the General Counsel; Isaac Kort-Meade, Sandra Day O'Connor College of Law at Arizona State University.

If you are interested in contributing to future editions, please contact the editor.

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OREGON COURT OF APPEALS

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***Los Padres ForestWatch v. United States Forest Service*, 25 F4th 649 (9th Cir 2022).**
Sara Ghafouri, American Forest Resource Council

Introduction

On February 4, 2022, in a 2-1 decision, the United States Court of Appeals for the Ninth Circuit vacated the district court's summary-judgment decision in favor of the United States Forest Service, holding that the Forest Service's Decision Memo approving the Tecuya Ridge Shaded Fuelbreak Project located on the Los Padres National Forest was arbitrary and capricious. District Judge Sidney Stein (sitting by designation) authored the majority opinion, joined by Judge Kenneth K. Lee, while Judge Ryan D. Nelson dissented in part while agreeing with Sections I.B and II of the majority opinion. This panel also heard and contemporaneously issued the opinion (below) in *Mountain Communities for Fire Safety v. Elliott*, 25 F4th 667 (9th Cir 2022) regarding the Cuddy Valley project.

Factual and Administrative Background

The Tecuya Ridge Project is a shaded fuelbreak project that overlooks the mountain communities of Lebec, Frazier Park, Lake of the Woods, Pine Mountain Club, and Pinon Pines Estates. The fuelbreak is in close proximity to the Cuddy Valley shaded fuelbreak and was also authorized under the timber stand improvement categorical exclusion ("CE"). The Tecuya Ridge Project is "home to densely populated forest stands," and "the Forest Service has determined that both the forest and the adjacent mountain communities are at risk of destruction by wildfire." To address this risk, the Tecuya Ridge Project aims to create a fuelbreak, a "'wide strip or block of land on which the native or pre-existing vegetation has been permanently modified so that fires burning into it can be more readily extinguished,' running roughly in a jagged line along the Tecuya Ridge." The Tecuya Ridge Project authorized thinning 1,626 acres of forest, with approximately 1,100 acres within a protected area called the Antimony Inventoried Roadless Area ("IRA").

Ninth Circuit's Analysis

Under the Roadless Area Conservation Rule ("Roadless Rule"), timber harvest is generally prohibited, subject to some exceptions. As relevant in this case, timber harvest may occur in an inventoried roadless areas if the Responsible Official determines that "[t]he cutting, sale, or removal of generally small diameter timber is needed" to "reduce the risk of uncharacteristic wildfire effects" and "will maintain or improve one or more of the roadless area characteristics as defined in § 294.11." In the majority opinion, the Court acknowledged that when promulgating the Roadless Rule, "the Forest Service specifically chose not to define 'what constitutes "generally small diameter timber"' because '[s]uch determinations are best made through project specific or land and resource management plan NEPA analyses,' as guided by certain ecological considerations." The Court then undertook the following analysis.

First, the majority determined that the Forest Service's conclusion that the Tecuya Ridge Project is consistent with the Roadless Rule was arbitrary and capricious. Although the panel upheld the

***Los Padres ForestWatch v. United States Forest Service*, 25 F4th 649 (9th Cir 2022).**
Sara Ghafouri, American Forest Resource Council

Forest Service's determination that the Project will "maintain or improve" the Antimony IRA's characteristics, it simultaneously rejected the Forest Service's conclusion that 21-inch diameter breast height ("dbh") trees were "generally small timber" as arbitrary and capricious. The Los Padres Forest Plan defines large-diameter trees as those of over 24-inches dbh but did not define a small diameter tree. The majority panel found no record evidence to support the determination regarding small diameter timber and held that the "Forest Service has failed to articulate a satisfactory explanation—in the administrative record, in briefing, and at oral argument—for its determination that the 21-inch dbh trees that inhabit the Project area are 'generally small' within the meaning of the Roadless Rule." The majority opinion went on to state that "the Court does not require the Forest Service to undertake any particular method of providing a reasoned explanation for its choice to designate trees of up to 21-inches dbh as 'generally small.' … But where the decision of the agency is not sustainable on the administrative record made, then the ... decision must be vacated and the matter remanded ... for further consideration." (internal quotation marks omitted). As a result, the panel remanded for the Forest Service to substantiate its conclusion that 21-inch dbh trees are "generally small" within the Project area, consistent with the Roadless Rule. Judge Nelson dissented with respect to this aspect of the decision.

Next, the panel upheld the Forest Service's decision to authorize the project under the timber stand improvement CE. The panel noted that in the related Cuddy Valley Project appeal, the panel had agreed with the Forest Service's reading of the timber stand improvement CE such that the sole remaining issue was whether the Forest Service's decision to apply the CE to the Project was arbitrary and capricious because it failed to analyze fuelbreak efficacy as a potential "extraordinary circumstance" that would preclude the application of any CE to the project. The Court disagreed with plaintiffs-appellants and found that the Forest Service's determination that no extraordinary circumstances prevented its application of timber stand improvement CE was not arbitrary and capricious and that the agency appropriately analyzed each resource condition that should be considered in determining whether there were extraordinary circumstances related to the proposed action. "Consistent with 36 C.F.R. § 220.6, the Forest Service analyzed each resource condition and determined that the Project would have 'no significant impact' on each. Although the list of resource conditions located at 36 C.F.R. § 220.6(b) is not intended to be exhaustive, NEPA merely permits, rather than requires, the Forest Service to consider additional factors during its extraordinary circumstances review."

Ultimately, although the Court rejected the plaintiffs-appellants' challenge under NEPA, it remanded the matter based on its analysis of the issue of compliance with the Roadless Rule.

***Mountain Communities for Fire Safety v. Elliott*, 25 F4th 667 (9th Cir 2022).**

Sara Ghafouri, American Forest Resource Council

Introduction

On February 4, in a 2-1 decision, the Ninth Circuit affirmed the district court's decision granting summary judgment in favor of the United States Forest Service in a challenge to the Cuddy Valley Project located on the Los Padres National Forest. The majority panel included Judges Ryan D. Nelson and Kenneth K. Lee with Judge Sidney H. Stein (sitting by designation) dissenting.

Factual and Administrative Background

The Cuddy Valley project is a shaded fuelbreak project, which was identified in the Mt. Pinos Community Wildfire Protection Plan and the Los Padres National Forest Strategic Fuelbreak Assessment as "strategic for wildfire and prescribed fire management." The project area has become overcrowded with vegetation, where single-leaf pinyon and California juniper woodlands and forests dominate the lower elevations and older Jeffrey pine dominate the higher elevations. To address the overcrowding problem and potential for insect and disease outbreaks, the Forest Service proposed 1,200 acres of thinning, claiming this would reduce "stand density, competing vegetation, and fuels." The project would allow commercial harvest on up to 601 acres of Jeffrey pine and pinyon-juniper stands.

Upon determining that there were no "extraordinary circumstances" present that would warrant further analysis, the Forest Service authorized the project under the timber stand improvement categorical exclusion (timber stand improvement CE or CE-6), 36 C.F.R. § 220.6(e)(6), such that the Forest Service was not required to prepare an Environmental Assessment (EA) or Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA). The timber stand improvement CE allows for "[t]imber stand and/or wildlife habitat improvement activities that do not include the use of herbicides or do not require more than 1 mile of low standard road construction" and include "[t]hinning or brush control to improve growth or to reduce fire hazard . . . ."

Ninth Circuit's Analysis

On appeal, plaintiffs-appellants challenged the Forest Service's reliance on the timber stand improvement CE, arguing that "timber stand improvement" activities are limited to stands in the sapling stage and that commercial harvest activities do not fall within the scope of the CE. The central issue in the appeal was as follows: "Does CE-6 permit thinning larger commercially viable trees?"

Judge Lee, authoring the majority decision, determined that the timber stand improvement CE "unambiguously allows the Forest Service to thin trees, including larger commercially viable ones, to reduce fire hazard without having to conduct an EIS or EA. Its plain language does not limit thinning by tree age, size, or type. Nor is thinning defined to exclude commercial thinning. If the thinning project reduces fire hazard and meets certain other conditions, [the timber stand

improvement CE] greenlights the project, even if it means felling commercially viable trees." In construing the CE's plain language, the panel acknowledged that the regulation does not carve out an exception for commercial thinning. And the court also determined that the phrase "timber stand improvement" itself does not place limits on tree age or size.

The majority panel examined CE-6's list of examples of timber stand improvement activities, which includes "[t]hinning or brush control to improve growth or to reduce fire hazard including the opening of an existing road to a dense timber stand." The panel rejected plaintiffs-appellants' argument that thinning was limited to smaller trees: "To 'thin' generally means to 'render less crowded or close by removing individuals; hence, to reduce in number.'" (Citing Thin, Oxford English Dictionary 941 (2d. ed. 1991); Thin, Webster's Third New Int'l Dictionary 2376 (1993) ("to remove surplus plants or trees ... so as to improve the growth of the rest").)

The majority panel also examined relevant sources that were around at the time CE-6 was adopted in 1992, including the 1990 Forest Service Manual in effect at that time. The 1990 Forest Service Manual directed readers to the Society of American Foresters' publication "Terminology of Forest Science, Technology, Practices, and Products" "as the recognized basis for silvicultural [tree] terminology and definitions." The Society of American Foresters, in turn, defined "timber stand improvement" as "[a] loose term comprising all intermediate cuttings made to improve the composition, constitution, condition and increment of a timber stand." (citing Society of American Foresters, Terminology of Forest Science, Technology, Practices, and Products 277 (F.C. Ford-Robertson ed., 1971)). The panel concluded that the definition is a broad concept and does not limit cutting to only pre-commercial trees or saplings.

Next, the majority panel held that the Forest Service's decision to apply CE-6 to the Cuddy Valley Project was not arbitrary and capricious. Plaintiffs-appellants argued that the Forest Service "ignored NEPA's intensity factors when deciding that no extraordinary circumstances existed that would bar relying on CE-6." The majority panel concluded that the Forest Service did not have to examine the intensity factors under 40 C.F.R. § 1508.27(b) when analyzing whether "extraordinary circumstances" prevented the use of the timber stand improvement CE. "To require an agency to analyze the extraordinary circumstances factors once (under resource conditions), and then again under merely renamed factors, would be 'inconsistent with the efficiencies that the abbreviated categorical exclusion process provides.'" (Citing *Ctr. for Biological Diversity v. Salazar*, 706 F3d 1085, 1097 (9th Cir 2013)).

Finally, the majority panel held that the Forest Service did not violate the National Forest Management Act (NFMA) in its determination that the project complies with the Los Padres Forest Management Plan's Aesthetic Management Standards. Plaintiffs-appellants' first argument was procedural—whether the Forest Service followed the correct timeline in explaining how the project would meet these aesthetic management standards. The majority panel determined that the Forest Service's submission of its compliance analysis during supplemental briefing was not a *post*

hoc rationalization. Plaintiffs-appellants' second argument was that the Forest Service failed to demonstrate that the Cuddy Valley Project would meet the aesthetic management standards. The majority panel disagreed, finding that the Forest Service did not act arbitrarily and capriciously in concluding that the project tracks the Forest Plan Scenic Integrity Objectives.

For these reasons, the majority affirmed the district court's grant of summary judgment in favor of the Forest Service.

***Oregon Department of Fish & Wildlife v. Crook County*, 315 Or App 625 (2021).**
Dan Hytrek, NOAA Office of the General Counsel

Introduction

Petitioner West Prineville Solar Farm, LLC ("Solar Farm") applied to petitioner Crook County for approval of a modification to an existing conditional use permit for a solar photovoltaic facility, seeking to increase the facility size from 320 acres to 654 acres on non-arable land. Solar Farm's permit modification application was made under ORS 215.446, enacted in 2019, which provides wildlife mitigation standards for counties to apply when determining whether to authorize mid-size renewable energy facilities (as applied in this case, solar facilities between 321 acres and 1,920 acres). Crook County approved the application, but respondent the Oregon Department of Fish and Wildlife ("ODFW") appealed that decision to Oregon's Land Use Board of Appeals ("LUBA"), arguing that Solar Farm failed to include in its required mitigation plan all of the information set forth in OAR 635-415-0020(8). LUBA agreed with ODFW, and petitioners asserted on judicial review that LUBA misconstrued ORS 215.446 by concluding that it requires a mitigation plan to include each and every one of the OAR 635-415-0020(8) information requirements. On appeal, the Court agreed with petitioners that LUBA erred in its construction of ORS 215.446 and reversed and remanded the matter to LUBA.

Regulatory Background

Before the enactment of ORS 215.446 in 2019, the Energy Facility Siting Council (EFSC) was solely responsible for permitting solar energy facilities that use more than 320 acres of non-arable land. Based on concerns of the renewable energy industry that the EFSC process was lengthy, cumbersome, and expensive, the legislature enacted ORS 215.446 to provide an alternative permitting process that is similar to the one for small solar energy facilities of 320 acres or less with counties acting as the permitting authority. In allowing developers to seek permitting for small *and* mid-sized facilities at the local level, the legislature did not remove the ability of developers to seek permitting for mid-sized solar facilities under the EFSC process if they so choose.

Analysis of Oregon Court of Appeals

The Court reviewed LUBA's decision for legal error in its interpretation of applicable law. The Court noted that the crux of LUBA's decision was the conclusion that ORS 215.446 requires a mitigation plan to include all of the OAR 635-415-0020(8) information requirements. ORS 215.446(3)(a)(C) provides that a county must require an applicant to "[d]evelop a mitigation plan to address significant fish and wildlife habitat impacts *consistent with* the administrative rules adopted by the State Fish and Wildlife Commission for the purposes of implementing ORS 496.012[.]" (Emphasis added.) These rules are known as ODFW's "Mitigation Policy." LUBA construed the phrase "[d]evelop a mitigation plan to address significant fish and wildlife impacts consistent with the administrative rules" of the Mitigation Policy (emphasis added) to mean all rules of the Mitigation Policy, including the entirety of OAR 635-415-0020(8) and each of its subparagraphs. The Court concluded that rules in the Mitigation Policy create different

obligations for applicants depending on whether ODFW is acting as the permitting authority and requiring mitigation based on its statutory authority or is recommending mitigation to other permitting authorities. OAR 635-415-0020(8) indicates that the information required under that rule must be included when an application is prepared *for ODFW as permitting authority* (not recommender). ORS 215.446 provides that a county is the permitting authority for mid-sized renewable energy facilities, with ODFW serving in an advisory capacity. Therefore, the Court concluded that LUBA erred as a matter of law in concluding that ORS 215.446 requires a mitigation plan to include all of the OAR 635-415-0020(8) information requirements, and the Court reversed and remanded with further instructions to LUBA.

Court's Guidance on Remand

The Court went on to provide some guidance to LUBA on remand regarding what "consistent with" the Mitigation Policy *does* require as relevant to the issues raised by the parties. Based on the definition of "Mitigation Plan" in the Mitigation Policy at OAR 635-415-0005(18), specificity and definiteness are required for a mitigation plan to be consistent with the Mitigation Policy. The Court also noted the standards set out for each Habitat Category in OAR 635-415-0025. Petitioners accepted that the goals for Habitat Categories 3 and 4—"no net loss" in both cases—are appropriate criteria for Solar Farm's mitigation plan. Based on standards in OAR 635-415-0025, the Mitigation Policy requires reliable "no net loss" mitigation and a schedule of performance measures. Finally, based on OAR 635-415-0020(4), the court noted that the Mitigation Policy includes, regardless of ODFW's particular role, considerations of duration as to the development action and the mitigation efforts. Ignoring those considerations would allow for mitigation measures that fail to accommodate the impact on habitat for the full life of a renewable energy facility.

***Western Watersheds Project v. Haaland*, 22 F4th 828 (9th Cir 2022).**

Isaac Kort-Meade, Sandra Day O'Connor College of Law at Arizona State University.

Introduction & Background

This case arises from an ongoing challenge to oil and gas leasing in Idaho and other Western states. In 2010 the U.S. Fish and Wildlife Service designated the greater sage-grouse as an endangered species. In 2015, the U.S. Forest Service issued Resource Management Plans which directed the Bureau of Land Management ("BLM") to prioritize oil and gas leasing outside sage-grouse habitats in various Western states. In 2016, the BLM issued an Instruction Memorandum ("IM") to guide enforcement of these requirements.

After President Trump took office, the BLM shifted course and accelerated oil and gas leasing in sage-grouse habitat by issuing a new IM. The BLM issued leases in Wyoming to Chesapeake Exploration, LLC ("Chesapeake"), the proposed intervenor in this case. Chesapeake paid over $8 million for seven leases and began drilling wells in accordance with relevant permits.

In 2018, plaintiffs-appellees Western Watersheds Project and Center for Biological Diversity sued the BLM to challenge leases issued on sage-grouse habitats alleging that BLM's issuance of the 2018 IM was contrary to the procedural requirements in the Federal Land Policy & Management Act ("FLPMA"), National Environmental Policy Act ("NEPA"), and the Administrative Procedure Act (APA). After the complaint was filed, the Western Energy Alliance ("WEA") was allowed by the District Court to intervene. WEA is a regional trade organization representing more than 200 oil and gas companies, including Chesapeake. In December 2018, the District Court split the case into multiple phases. Two of Chesapeake's leases were contained in Phase One, the rest in subsequent phases.

In February 2020, the district court entered partial summary judgment in favor of plaintiffs, finding that BLM's new rules violated the relevant statutes (above). The court stayed vacatur of these leases pending appeal and halted any further development or production. However, the court recognized that some maintenance work on the leased property would be necessary and allowed motions from interested parties to ascertain what maintenance, if any, would be allowed.

Soon after this order, Chesapeake moved to intervene in the Phase One litigation and subsequent litigation. Chesapeake claimed that its interests were not properly protected by WEA and it had only found out that its leases were involved in the litigation after the February 2020 vacatur order. The District Court denied this motion, finding in part that WEA provided sufficient representation, Chesapeake was not a necessary party, and the motion was untimely.

Ninth Circuit's Analysis

On appeal, the Ninth Circuit focused on two of four disputed factors under FRCP 24(a)(2) for a motion to intervene. The Court stated that a party is entitled to intervention as of right when it "timely moves to intervene . . . [and] has a significantly protectable interest related to the subject of the action."

First, to determine whether Chesapeake's motion was timely, the court considered three relevant factors: "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." On the first factor, the court differentiated this case from previous ones by recognizing that the two phases of litigation were entirely separate and involved disparate issues. Additionally, there was no evidence that Chesapeake had known about the litigation until the vacatur order. Thus, this was an appropriate phase of the ligation for intervention.

On the second factor, the court recognized that prejudice to other parties was the most important factor in deciding whether the motion was untimely. Chesapeake's intervention in Phase One was within the allowed time period and its intervention in subsequent phases was made before those phases began. Thus, parties would not be prejudiced by any new arguments Chesapeake may make and the motion was timely.

On the third factor, the court evaluated the length of time between when Chesapeake knew or should have known that its interests were inadequately represented and its motion. The Court found that Chesapeake's membership in WEA was not evidence that it would have been put on notice that its leases were involved in the litigation. Chesapeake's motion was made three months after it discovered that its leases were involved, which was a reasonable amount of time.

Next, the Court evaluated whether Chesapeake met its burden of proving that the representation of its interests by other parties may be inadequate. First, the Court considered whether the interest of a present party is such that it will undoubtedly make all of the proposed intervenor's arguments. While WEA and Chesapeake shared the same "ultimate objective" in the litigation, Chesapeake established that it would make three arguments distinct from those made by WEA, thus succeeding on this factor. The Court next considered whether the present party is willing and capable of making such arguments. WEA had only submitted 10 pages in its Phase One brief and failed to include many of the arguments Chesapeake sought to raise. Finally, the Court discussed whether the intervenor would offer any "necessary elements" that other parties would neglect. Chesapeake is an actual lessee, unlike WEA, and so the Court reasoned that it had a unique interest in the lease dispute. Additionally, WEA is obligated to represent the interests of all its members, while Chesapeake only represents its own unique interests.

Conclusion

Based on the arguments above, the court held that Chesapeake satisfied the requirements to intervene as of right and reversed and remanded the matter. The Court's opinion is significant not only for its background exposition on oil and gas leasing and management of sage-grouse habitat but also for the possible implications for the orderly administration of litigation in large multi-party disputes arising from the implementation of an overarching agency policy in a large geographic area.