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Recent Environmental Cases and Rules

Environmental & Natural Resources Section — Oregon State Bar
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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: Sydney Hofferth, University of Michigan; Ryan Shannon, Center for Biological Diversity; and Max Yoklic, NewSun Energy.

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

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***County of Linn v. State of Oregon*, 319 Or App 388 (2022).**
Max Yoklic, In-House Counsel, NewSun Energy.

The State of Oregon enacted the Forest Acquisition Act in 1939 and added language in 1941 allowing Oregon counties to convey county lands to the State of Oregon to be held as state forests in consideration for the payment of a percentage of revenue derived from the forestlands (the "1941 Act"). ORS 530.010; ORS 530.030; *see also* ORS 530.110, ORS 530.115 (establishing county revenue interest of approximately 63.75% after credits). The State Board of Forestry ("BOF") manages lands acquired by the State under the 1941 Act (the "BOF lands") pursuant to the terms of the 1941 Act and Oregon Department of Forestry ("ODF") implementing regulations. *See* OAR Chapter 629, Division 35. Under ORS 530.050, BOF "shall manage the lands acquired . . . so as to secure the greatest permanent value of those lands to the state." As of 2022, the State manages 729,718 acres of forestlands in which 15 Oregon counties—known as the Council of Forest Trust Land counties, have a protected interest.[1] For fiscal year 2021, the BOF distributed approximately $71.5 million to counties and retained $42.9 million in revenue. *Id.*

In 2016, Linn County brought a class action lawsuit against the State on behalf of 14 of the 15 Council of Forest Trust Land counties (excepting Clatsop County) and over 150 taxing districts as third-party beneficiaries. The Counties alleged that the State breached its obligation to manage the forestlands to achieve the "greatest permanent value" from the BOF lands by implementing management plans that failed to maximize revenue due to prioritization of other social and environmental values. The Linn County Circuit Court determined that the Counties had a protected interest in deriving maximum revenue from the forestlands, and a jury awarded the Counties $1.06 billion. The judgment was appealed.

The crux of the case on appeal was whether the term "greatest permanent value" was a statutory contract term securing the Counties' interest in ensuring that the state derives the maximum revenue from BOF lands for the benefit of the Counties. *County of Linn v. State of Oregon*, 319 Or App 288, 510 P3d 962 (2022). The Court of Appeals first assumed, without deciding, that the 1941 Act created a statutory contract "to at least some extent" leaving the critical question of whether "greatest permanent value" in ORS 530.030 is a term of that statutory contract. *Id.* at 299.

The Court of Appeals began its analysis by discussing the Oregon Supreme Court's decision in *Tillamook Co. v. State Board of Forestry*, 302 Or 404, 730 P2d 1214 (1986). *Tillamook* established that counties that transferred land to the State pursuant to the 1941 Act have some "protected, recognizable interest" that can be asserted against the State and that the State breached its contractual obligation to pay revenues to those counties when it unilaterally conveyed revenue-producing land to a third party in exchange for non-revenue-producing land used as a state park. *Id.* at 417–19. The Court of Appeals determined that *Tillamook* neither concluded nor indicated that the "greatest permanent value" management standard in ORS 530.050 is a term of statutory contract. *County of Linn*, 319 Or App at 298.

The Court of Appeals then turned to the text, context, and legislative history of the 1941 Act. First, the Court of Appeals noted that there is a presumption against statutory contracts because legislatures do not usually intend to prevent future legislatures from changing course. *Id.* at 303. The rule under Oregon law is that a court will treat a statute as a contractual promise only when

[1] Council of Forest Trust Land Counties, *Annual Report, Fiscal Year 2021* (Nov. 2021), *available at* https://www.oregon.gov/odf/Documents/workingforests/cftlc-annual-report-2021.pdf.

the legislature "clearly and unmistakably" expresses contractual intent. *Id.* (citing *Health Net Inc. v. Dept. of Rev.*, 362 Or 700, 716, 415 P3d 1034 (2018)). The "clear and unmistakable" intent rule applies to contractual offers themselves and to whether a particular provision of a statute is a term of that contractual offer. *Id.* Language referring directly to contracts, promises, or guarantees is not required, but there must be a clear and unmistakable intent to impose contractual obligations on the State. *Id.* at 304.

Applying these principles, the Court of Appeals explained that Section 5 of the 1941 Act (ORS 530.050) dictated that the BOF lands shall be managed "so as to secure the greatest permanent value of such lands *to the state*." (Emphasis added.) Because the language directed BOF lands to be managed to provide value to the State, rather than the Counties, the Court found the legislature intended the State to be the beneficiary of the "greatest permanent value" management standard. But the Court of Appeals also observed a distinction between Section 3 and Section 5 of the Act in this regard. While Section 5 did not contain unambiguous promissory language, Section 3—stating counties may convey lands to the State for state forests "*in consideration of* the payment to such county of the percentage of revenue derived from such lands" (ORS 530.030, emphasis added)—is, indeed, promissory in nature as gives counties an enforceable contractual right pursuant to *Tillamook*. Significantly, however, the Court reasoned that if the legislature had intended the "greatest permanent value" management standard to be part of the contractual offer to the Counties, it likely would have used unambiguous promissory language in Section 5 as it had done in Section 3. Otherwise, the Court of Appeals observed that the text of the statute did not indicate an intent to prevent future legislatures from amending the management standard, so long as revenue generation remains one use of the state forests, and that the lack of a legislative commitment to not repeal or amend the statute in the future indicated the absence of a contractual offer that included the right to the "greatest permanent value." Finally, the Court found that ambiguity in the term "greatest permanent value" reflected legislative intent to delegate interpretive authority to the BOF in a manner contrary to a finding of clear and unmistakable intent to impose a contractual obligation on the State.

Based on these considerations, the Court of Appeals rejected the Counties' contention that they were contractually entitled, not simply to a share of revenue, but to the "greatest permanent value," particularly monetary value, derived from the forestlands. The Court of Appeals reversed the trial court's decision to deny the State's motion to dismiss, effectively disposing of the case.[2]

[2] In July 2022, the Counties filed a petition for review by the Oregon Supreme Court, arguing that the Court of Appeals misinterpreted and misapplied *Tillamook*. *See Linn County v. Or. Dep't of Forestry*, No. 16CV07708, CAA173658, N010899 (Or. Supreme Ct., July 6, 2022). The Oregon Supreme Court denied the petition for review on September 16, 2022.

***Center for Biological Diversity, et al. v. USFWS, et al.*, 33 F4th 1202 (9th Cir 2022).**
Ryan Shannon, Staff Attorney, Center for Biological Diversity.

The Ninth Circuit affirmed the district court's judgment that the U.S. Forest Service acted arbitrarily and capriciously in approving the entirety of Rosemont Copper Company's mining plan of operations ("MPO").

The Mining Law of 1872 allows mining companies to occupy federal land on which valuable minerals have been found, as well as non-mineral federal land for mill sites. 36 C.F.R. Part 228, Subpart A governs surface uses of forest land relating to mining under the Mining Law. The Surface Resources and Multiple Use Act of 1955 ("Multiple Use Act") forbids the use of an unpatented mining claim "for any purposes other than prospecting, mining, or processing operations and uses reasonably incident thereto." 30 U.S.C. § 612(a).

In this case, several environmental groups and tribes (who had filed a separate case that was consolidated), challenged the Service's approval of the MPO authorizing Rosemont to use mining claims to permanently occupy and dump 1.9 billon tons of waste rock and tailings (collectively referred to as waste rock in the decision and herein) on 2,447 acres of National Forest land. The Service approved the MPO on two separate grounds. First, the Service concluded that Section 612 of the Multiple Use Act gave Rosemont the right to dump waste rock on National Forest land without regard to whether it had any mining rights on that land. Second, the Service assumed that Rosemont had valid mining claims under the Mining Law for the 2,447 acres it proposed to occupy with its waste rock even though undisputed evidence showed no valuable minerals had been found on the claims—a prerequisite to a valid claim.

Upon review, the district court held that neither ground supported the Service's approval of Rosemont's MPO. On appeal, the panel agreed with the district court's holding that Section 612 of the Multiple Use Act granted no implied rights to use the surface outside of a claim—an argument the Government had abandoned on appeal. The panel also agreed with the district court's holding that the Service had no basis for assuming that Rosemont's mining claims were valid under the Mining Law. It concluded that "neither Section 612 nor the Mining Law provide[d] Rosemont with the right to dump its waste rock on thousands of acres of National Forest land on which it has no valid mining claims." Slip Op. at 31.

The panel remanded the decision to the Service for further proceedings consistent with the Government's concession that Section 612 grants no rights beyond those granted by the Mining Law and the holding that Rosemont's mining claims on the 2,447 acres were invalid under the Mining Law. The panel noted that it did not know whether the Service would have decided that Part 228A regulations were applicable to Rosemont's proposal to occupy invalid claims with its waste rock, and, if applicable, whether the Service would have construed those regulations to allow such occupancy. It left those questions to the Service for resolution on remand.

In a dissenting opinion, Judge Forrest expressed that he would have held that the regulations the Service adopted to fill in the gaps left by the Mining Law established that: (1) the lawfulness of waste-rock disposal did not depend on whether the mine operator had valid mining claims to the disposal area; and (2) it was not arbitrary and capricious for the Service to apply the Part 228A regulations to Rosemont's proposed deposit of waste rock because they expressly applied to this activity as a matter of law.

***Environmental Defense Ctr. v. Bur. of Ocean Energy Mgmt., et al.*, 36 F4th 850 (9th Cir 2022).**
Sydney Hofferth, J.D. Candidate (2023), University of Michigan.

On June 3, 2022, in a unanimous opinion, the United States Court of Appeals for the Ninth Circuit held that the Bureau of Ocean Energy Management ("BOEM") and the Bureau of Safety and Environmental Enforcement ("BSEE") acted arbitrarily and capriciously in issuing an environmental assessment allowing offshore well stimulation treatments in the Pacific Outer Continental Shelf off the coast of California.

BOEM and BSEE issued permits authorizing private companies to conduct offshore oil and development activities in the Pacific Outer Continental Shelf, including well stimulation treatments ("WSTs"). WSTs enable oil companies to extract oil and prolong drilling operations, thus expanding total production, by using unconventional drilling methods such as fracking. WSTs pose environmental and health risks due to the chemicals used—which include carcinogens and endocrine disruptors—and the high pressures used, which can increase the risk of oil spills. But BOEM and BSEE issued 51 permits for these activities without adequate environmental review.

Upon reaching a pre-litigation settlement with the environmental groups, the agencies performed a perfunctory environmental assessment and issued a Finding of No Significant Impact. The environmental groups and the State of California filed separate lawsuits challenging the agencies' conduct under NEPA and the Endangered Species Act ("ESA"). California also alleged violations of the Coastal Zone Management Act ("CZMA"). In reviewing cross-motions for summary judgment, the district court granted summary judgment for the agencies and against the plaintiffs on the NEPA claim and granted summary judgment in favor of the plaintiffs on the ESA and CZMA claims. Consistent therewith, the district court enjoined the agencies from approving permits for WSTs pending compliance with the ESA and the CZMA. On appeal, the Ninth Circuit reversed the district court's grant of summary judgment in favor of the agencies on the NEPA claim and affirmed the district court's grant of summary judgment on the ESA and CZMA claims in favor of the plaintiffs.

In the Ninth Circuit's opinion, it first held that the agencies' programmatic environmental review was a final agency action reviewable under the Administrative Procedure Act such that the NEPA and CZMA claims were ripe for review. The Court reasoned that the EA and FONSI reflected the agencies' "final word" on the environmental impacts of the proposed action thereby marking the consummation of the agencies' decision-making process. While the agencies, nevertheless, argued that the claims were not ripe because the agencies had not yet issued a formal plan for WSTs or acted on site-specific permits, the panel found that delaying review would cause hardship to the plaintiffs, that reviewing the claims would not inappropriately interfere with further administrative action, and that there was no need for further factual development.

Additionally, the Court held that the agencies' environmental assessment was inadequate and violated NEPA because it relied on incorrect assumptions and failed to take a "hard look" at the potential environmental effects of authorizing WSTs off the coast of California. The central assumption underpinning the agencies' EA and FONSI was that the use of WSTs in the Pacific Outer Continental Shelf "would happen so infrequently that any adverse environmental effects would be insignificant." On this basis, the agencies used what they considered to be a reasonable forecast of up to five WSTs per year. But the panel agreed with the plaintiffs that the historical data the agencies used in coming to this conclusion was inadequate because the agencies did not know the number of WSTs applied in the Pacific Outer Continental Shelf in the absence of a formal

tracking system. The Ninth Circuit also criticized the agencies' reliance on a permit issued by the EPA under the Clean Water act in assuming that the impacts of WSTs would be insignificant. The Court explained that "agencies cannot 'tier' their environmental review under NEPA to assessments of similar projects that do not 'actually discuss the impacts of the project at issue.'" In other words, an agency may not bootstrap an approval off of another agency's permit without undertaking its own review.

An additional deficiency under NEPA found by the Ninth Circuit was the agencies' failure to consider a reasonable range of alternatives. While the panel upheld the statement of "purpose and need" in the assessment, it held that the agencies improperly limited the alternatives in their analysis by considering only "alternatives" that would, subject to varying restrictions, still authorize the same, unlimited number of WSTs per year. The Court reasoned that the agencies incorrectly assumed that the action alternatives were limited to up to five WSTs per year and rejected the argument that it was unnecessary to consider "middle ground" alternatives.

The Ninth Circuit also held that the agencies were required to prepare an environmental impact statement because the proposed action met three of the Council on Environmental Quality's "intensity" factors (40 C.F.R. § 1508.27(b)), namely: (1) offshore WSTs may adversely affect endangered or threatened species; (2) WSTs in the Pacific Outer Continental Shelf would affect unique geographic areas; and (3) the effects of offshore WSTs are highly uncertain and involve unknown risks, due to the incorrect assumption about the number of WSTs per year.

In light of these deficiencies, the panel vacated the environmental assessment and remanded the matter to the district court with instructions to expand its injunction to prohibit the agencies from approving permits for WSTs until they issue a proper EIS and fully evaluate all reasonable alternatives.

As to the affirmance on the remaining claims, the panel rejected the agencies' argument that Section 7 consultation was not required under the ESA because the environmental assessment did not constitute "agency action." The Court held that the agencies did, in fact, take agency action because they affirmatively decided to allow the WSTs to proceed and had discretion to influence the activity "for the benefit of a protected species." The Court also held that the agencies violated the CZMA when they failed to conduct a consistency review to determine whether the use of offshore WSTs was consistent with California's coastal management program. In reaching this conclusion, the panel rejected the argument that consistency review was not triggered because no "federal agency activity" occurred. Instead, the Court held that a consistency review was required at the programmatic stage rather than a later permitting stage. Based on these conclusions, the Court not only affirmed the district court's grant of summary judgment in favor of plaintiffs on these claims but upheld the district court's injunction, concluding that it was not unreasonable for the district court to make a finding of harm flowing from the regulatory noncompliance of the agencies.