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Editors' Note: This issue contains summaries of recent judicial opinions that may be of interest to members of the Environmental & Natural Resources Section. Any opinions expressed herein are of the author alone.

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***PNW Metal Recycling, Inc., et al v. Department of Environmental Quality*, 371 Or. 673 (2023),** *summarized by* Jessica Bernardini, Tonkon Torp LLP.

Background

PNW Metal Recycling Inc. ("Plaintiff") operates scrap metal recycling facilities that accept vehicular and non-vehicular materials. Plaintiff operates the facilities under vehicle dismantler certificates issued by the Oregon Department of Transportation under ORS 822.110. Although the materials handled by Plaintiff fall within the statutory definition of "solid waste" under ORS 459.005(25), the Oregon Department of Environmental Quality ("ODEQ") historically had not required solid waste disposal site permits issued under ORS 459.205 for facilities that held vehicle dismantler certificates, even if those facilities engaged in other solid waste disposal activities. However, in 2018, following a fire at a Portland automobile shredding facility (not operated by Plaintiff), ODEQ reviewed its regulation of vehicle dismantlers. ODEQ prepared an internal memorandum noting that the statutory auto-dismantler exception under ORS 459.005(8) "could be applied narrowly to only cover auto dismantling operations—leaving other solid waste activities subject to regulation." Shortly thereafter, ODEQ informed Plaintiff that it would need to obtain a solid waste disposal site permit for its non-vehicular waste processing.

Plaintiff challenged ODEQ's decision by initiating a proceeding under ORS 183.400(1), which allows the Court of Appeals to determine "[t]he validity of any rule … upon a petition by any person" to the court. Two other Oregon corporations involved in auto scrap metal recycling—Schnitzer Steel Industries, Inc., and Pacific Recycling, Inc.—joined Plaintiff (collectively, "Plaintiffs"). Plaintiffs argued that ODEQ's 2018 interpretation of the statute was a "rule", and therefore, ODEQ had failed to follow rulemaking procedures, additionally asserting that ODEQ could not have adopted a rule because it lacks the rulemaking authority to do so. ODEQ challenged this position, arguing that ORS 183.400 is inapplicable because ODEQ had not promulgated a "rule." The Court of Appeals agreed with Plaintiffs, concluding that ODEQ's actions met the definition of a rule under ORS 183.310(9), and therefore, the "rule" was invalid. ODEQ petitioned for review of the Court of Appeals decision by the Oregon Supreme Court.

Legal Background

Because the case touched on several important questions of administrative law, before addressing Plaintiffs' arguments, the Court provided background on the relevant statutory provisions. First, the Court noted that the Oregon Administrative Procedure Act ("APA") sets out procedures that govern state agencies in the performance of their functions (legislative, executive, or adjudicative). The Court emphasized that there is a clear distinction in the APA between procedures applicable to an agency's exercise of its legislative function

(which results in a rule, intended to be applied generally) and those procedures governing an agency's use of its executive and adjudicatory powers (which are carried out through orders or contested cases, intended to address particular fact patterns). The Court introduced this to preface that in some circumstances, an agency must use rulemaking, rather than a contested case process, to announce policy, and whether that is so, is "determined not by the APA, but, instead, by the agency's substantive enabling statues." 371 Or. at 678.

Next, the Court discussed the statutes that establish ODEQ and set out its authority. The Court stated that ODEQ was created as the department that exists under the Environmental Quality Commission ("EQC"), the purposes of which are to "administer and enforce the laws of the state concerning environmental quality." *Id.* at 679 (quoting ORS 468.045(1)(c)). The Court further clarified that EQC has the authority to adopt rules, while ODEQ is directed to "administer and enforce" the environmental laws "subject to policy direction" by EQC. *Id.*

Finally, the Court discussed the statutes that regulate solid waste disposal. Specifically, the Court noted that ORS 459.045 authorizes EQC to adopt rules pertaining to solid waste management, and while ORS 459.205 charges ODEQ with the issuance of permits for solid waste disposal sites, there are no statutes that afford ODEQ rulemaking authority on that subject.

The Court's Analysis

1. *Identification of a "Rule" Subject to Review Under ORS 183.400*

After laying out the foregoing principles, the Court addressed Plaintiffs' first assertion: that ODEQ's interpretative decision constitutes a rule, and therefore, it may be challenged in a proceeding under ORS 183.400. Under ORS 183.310(9), the definition of a rule exempts "intra-agency memorandum," "internal management directives … which do not substantially affect the interest of the public," and "declaratory rulings issued pursuant to ORS 183.40." Nonetheless, Plaintiffs assert that the memorandum in conjunction with communications are "evidence" of a rule. The Court discussed how the APA provides agencies with other avenues to make interpretations or statements of law that do not meet the definition of a rule (e.g., declaratory rulings, contested cases process to adopt general policies), and noted that the APA makes clear that "not all announcements and interpretations of law or policy are 'rules.'" Accordingly, the Court held that Plaintiffs failed to establish how ODEQ's decision to change its statutory interpretation constituted a "rule" under the APA, and thus, ODEQ's interpretative decision was not subject to review under ORS 183.400.

2. Agency's Use of Rulemaking Proceedings

Plaintiffs' also asserted that the statutes addressing solid waste disposal authorized ODEQ with making a discretionary policy choice, which must be effectuated through rulemaking, as evidenced by ODEQ adopting different interpretations of the auto-dismantler exception at different times. The Court stated that one must look to the agency's enabling statutes to determine how the legislature intended for the agency to perform the task in question. Where statutory terms are delegative, the agency has rulemaking authority, and where statutory terms call only for interpretation, rulemaking is not required because the agency could state its interpretation during enforcement without first adopting a rule. The Court concluded that although a statute is open to multiple possible interpretations, that does not mean that an agency has been delegated the authority to make a policy decision to be effectuated solely through rulemaking. Although the Court did not resolve the question for this case, it observed "the parties' apparent agreement that DEQ lacks rulemaking authority in this area would seem to cut against a conclusion that the legislature intended to require rulemaking as a prerequisite for interpreting the auto-dismantler exception." 371 Or. at 697.

Conclusion

The Court vacated the decision of the Court of Appeals and dismissed Plaintiffs' judicial review. Interestingly, the Court concluded by presenting Plaintiffs with alternatives for future challenges to ODEQ's interpretation of the auto-dismantler exception, noting that (1) judicial review of a final order in a contested cause would present Plaintiffs with an alternative opportunity for judicial review of ODEQ's interpretation of the auto-dismantler exception; (2) Plaintiffs may seek to demonstrate that the solid waste disposal statutes can reasonably be read as the legislature intending for the agency to promulgate rules in advance of adjudication; or (3) Plaintiffs could seek a declaratory ruling from ODEQ as to the applicability of the auto-dismantler exception, with the ruling being reviewable in the same manner as a contested case.

***Bridge Creek Ranch v. Water Resources Department*, 329 Or. App. 568 (Or. Ct. App. 2023),** *summarized by* Stephen J. Odell, Marten Law.

Factual Background

The Bridge Creek Ranch, LLC ("Ranch") owns and manages the Painted Hills Reservoir ("Reservoir") that it uses to irrigate its agricultural lands in the area. The Ranch stores water in the off-channel Reservoir pursuant to two Oregon water right certificates that grant it the right to store specified volumes of water diverted from Bridge and Bear Creeks for irrigation use. Toward this end, the Ranch also holds a secondary water certificate that grants it the right to divert and apply water from the Reservoir (and Bear Creek) to irrigate specifically defined lands. The diversions from these creeks occur on adjacent federal lands that the Bureau of Land Management ("BLM") manages within the John Day River Basin in Wheeler County.

In 2016, the Ranch obtained a permit from the Oregon Water Resources Department ("OWRD") authorizing it to implement an improvement project for the Reservoir to increase its storage capacity by an additional 500 acre-feet of water for the benefit of resident fish. More specifically, the project calls for release of the stored water from the Reservoir to increase instream flows in both Bridge and Bear Creeks at critical low-flow periods to enhance fish and aquatic habitat. Because the current diversions supplying the Reservoir are on federal land, the Ranch has also coordinated its efforts with BLM to serve various federal objectives, including improvement of fish and riparian habitat. As part of those efforts, the Ranch and BLM entered into an agreement to move the Ranch's Bridge Creek Point of Diversion ("POD") from its current location on BLM land to a location on Ranch-owned land. Under this agreement, BLM provided a three-year right-of-way to enable the Ranch to relocate the Bridge Creek POD.

In order to effectuate transfer of the location of the Bridge Creek POD pursuant to the Ranch-BLM agreement, in 2021 the Ranch submitted a permanent water right transfer application to OWRD under ORS 540.510. OWRD returned the application without rendering a substantive determination, instead offering a one-sentence explanation simply stating that "[t]he Department does not have the authority to make POD changes to [Reservation]-rights for storage."

Procedural History

In response to OWRD's refusal to act on its application to transfer the POD for its Bridge Creek certificated water storage right, the Ranch filed a Petition for Writ of Mandamus in Marion County Circuit Court. The Petition requested that the Court issue a writ of mandamus directing OWRD to consider and process the Ranch's application, or to show cause for its declining to have done so. After the parties

jointly moved for, and the Court issued, an alternative writ of mandamus, OWRD filed a show cause response declaring its position that it lacked statutory authority to issue the requested Bridge Creek POD. The parties then briefed cross-motions for summary judgment, which Circuit Court Judge Audrey Broyles ultimately resolved in favor of the Ranch and, on that basis, ordered issuance of a peremptory writ of mandamus directing OWRD to process the Ranch's Bridge Creek POD application pursuant to ORS 540.510(1).

The Circuit Court initially determined that storage of water for various purposes qualifies as a "water use" under Oregon law and that therefore, the Ranch's certificated water storage right qualified as a "water use subject to transfer" within the meaning of ORS 540.505(4)(b) and 540.510(1). Although OWRD complied with the peremptory writ by commencing to process the Ranch's application, it nevertheless appealed for the purpose of securing a definitive ruling from the Court of Appeals on whether it indeed possesses the authority the trial court found it has under Oregon law. On appeal, the Oregon Court of Appeals ("Court") affirmed the ruling of the trial court for the reasons set forth below.

Legal Analysis

As the Court explained in its opinion, the "nub of the dispute" was the purely legal issue of whether OWRD has authority pursuant to ORS 540.510(1) to consider and grant a change in the POD for a certificated water storage right such as the one the Ranch holds. That provision states in relevant part that "*the holder of any water use subject to transfer* may, upon compliance with [operative ORS provisions], change the use and place of use, the point of diversion or the use of the water without losing priority of the right." ORS 540.510(1)(a) (emphasis supplied). The dispositive issue before the Court therefore was whether a certificated water storage right qualifies as a "water use subject to transfer," which in turn is defined in relevant part by statute as a "water use established by . . . a water right certificate." ORS 540.505(4)(b).

OWRD argued that a certificated water storage right does not constitute such a use largely on the basis of two putative distinctions it contended were germane to interpreting the statutory provisions at issue: (1) the distinction between the right to "store" water and the right to "use" water for all other purposes under Oregon Water Law, turning on the fact that a storage water right is the only type of use for which a secondary water permit is generally required; and (2) the distinction between "water use" and a "water right" based on OWRD's view that the right to store water does not give one authority to make a "beneficial use" but instead is simply an intermediate step that allows its holder to engage in the passive use of impoundment of water for eventual proactive "use" under a secondary layer of authority.

The Ranch countered by pointing out that the right to store water is generally governed by the same provisions of law as are any other type of water right under Oregon law, including, in particular, those providing OWRD may not approve a permit for any proposed use of water that does not constitute a "beneficial use." ORS 537.160(1). The Ranch also noted that the operative phrase for determining the scope of OWRD's authority to grant a change to a POD, "[w]ater use subject to transfer," is defined by statute to incorporate "a water use established by . . . a water right certificate," which includes water storage. Finally, with respect to the factual record, OWRD noted that the particular water storage right certificate it holds refers to the storage it provides the authority to undertake as a "beneficial use."

In turning to the merits, the Court began by looking more than a century into the past to the Oregon Supreme Court opinion in *Cookinham v. Lewis*, 58 Or. 484 (1911), which the Court read as holding that the type of use that supports a water storage permit does not constitute a "use" of water under Oregon Water Law. On the strength of that holding, the Court determined it had to agree with the foundational rationale of OWRD's position that "a water use subject to transfer" within the meaning of ORS 540.505(4)(b) "must be a beneficial use and that, with limited exceptions, a beneficial use of stored water is established not through the primary permit for storage but through the secondary permit."

Having accepted that much of OWRD's argument, however, the Court nevertheless pivoted to affirm the Circuit Court's judgment in favor of the Ranch given that the record in the case established that the Ranch had just such a secondary permit for irrigation use that had been perfected and certificated. Thus, the Court explained, when the Ranch's water storage certificate is read collectively with and in the context of its secondary water use certificate, the storage certificate becomes a water use subject to transfer within the meaning of ORS 540.505(4)(b).

Before announcing its ultimate ruling, the Court turned to address one last major argument from OWRD based on language in ORS 540.510(1)(b) that the Oregon Legislature added to the statute in 2021. That recently enacted provision provides that "[a] holder of a water right certificate that authorizes *the storage of water* may change the type of use identified in the water right certificate . . . without losing priority of the right" (emphasis supplied). OWRD's argument in this regard was that the Legislature's providing this explicit authority to the Department to change the type of use for a water storage right certificate would have been wholly superfluous if that authority was already conferred by ORS 540.505(1)(a), as the Ranch contended in its argument.

Although the Court acknowledged that OWRD's interpretation of both elements (a) and (b) of ORS 540.510(1) was "a plausible one," it rejected it for two primary reasons. First, as a textual matter, the Court found that ORS 540.510(1)(b) does

not provide that the authority it grants for a holder of a water storage right certificate to change its type of use is meant to be exclusive and, even if it were construed to be, the authority it grants is to change the "type of use," which does not track the precise wording of any of the changes authorized in ORS 540.510(1)(a). Second, the Court read the legislative history of ORS 540.510(1)(b) as providing no material insight into how to construe ORS 540.510(1)(a) because the Legislature did not amend the text of (1)(a) of that section when it added (1)(b), and also in light of the Oregon Supreme Court's admonition that a later Legislature's views on the meaning of a previously enacted statute carry no weight on how to construe what the earlier statute means in *DeFazio v. WPPSS*, 296 Or. 550, 561 (1984).

Conclusion

The Court concluded that the Ranch's Bridge Creek water storage right certificate does indeed give rise to a "water use subject to transfer" within the meaning of ORS 540.505(4) and ORS 540.510, and on that basis affirmed the Circuit Court's ruling that OWRD is required to at least consider the merits of the Ranch's application for a change to that certificate's POD.

***Northwest Natural Gas Co. v. Environmental Quality Commission*, 329 Or. App. 648 (Or. Ct. App. 2023)**, *summarized by* Greg Allen, Saalfeld Griggs, PC.

Background

Pursuant to Governor Brown's Executive Order 20-04, the Environmental Quality Commission ("EQC") promulgated "Cap and Reduce" rules to establish the Climate Protection Program ("CPP"). The rules created a cap-and-reduce system and imposed a technology and operations-based standard on certain large, stationary sources.

Under the rulemaking disclosure requirements of ORS 468A.327(1), agencies promulgating rules that apply to larger, stationary sources regulated under Clean Air Act ("CAA") Title V permits, are subject to heightened disclosure requirements. Under these heightened requirements, agencies must explain in notice of proposed rulemakings the scientific, economic, technological, and administrative reasons for exceeding any federal requirements and the reasons why any alternatives were not pursued.

Plaintiffs, a large coalition of industrial interests, challenged the rule under ORS 183.400(4)(c) for EQC's compliance with the rulemaking procedures set out in ORS 468A.327(1). Natural Resources Defense Council and other environmental groups intervened on the side of ECQ.

Whether Substantial or Actual Compliance Is the Correct Standard

As a threshold issue, EQC argued that the standard the Court should use for reviewing its adherence to rulemaking procedure was substantial compliance as opposed to actual compliance. The Court first determined under relevant case law that the standard of review was a matter of statutory interpretation. The Court then interpreted the plain language of ORS 468A.327(1) as requiring actual compliance because it included the phrase "shall include" when referring to the heightened disclosures requirements. As a matter of statutory context, the Court further noted that the legislature had demonstrated that it knows how to be clear in other statutes when substantial compliance should be the correct standard, especially when rulemaking mandates are accompanied by "shall" language; that clarity is absent in ORS 468A.327(1).

Lastly, the Court noted that the legislative history also supports the interpretation of the actual compliance standard, discerning that the legislative intent in enacting the heightened disclosure requirements of ORS 468A.327(1) was to provide assurance to regulated industries that EQC had been thorough in its rulemaking process. Thus, the Court concluded that ORS 468A.327(1) "require[s] what it says"

and applied the standard of actual, not substantial, compliance to its review of EQC's rulemaking procedure.

EQC Neither Actually nor Substantially Complied

The Court next determined that under either standard, EQC failed to comply with the heightened disclosure requirements when it adopted rules that applied to entities required to obtain Title V permits under the CAA. EQC acknowledged that it did not include an explicit statement about why it is exceeding federal requirements; instead, EQC's statement only read, "The proposed rules are in addition to federal requirements," without explaining the scientific, economic, technological, and administrative reasons for the heighted requirements. The Court thus concluded that this did not constitute even substantial, let alone actual, compliance with ORS 468A.327(1).

The Court also found that EQC did not adequately disclose the consideration of alternatives. EQC's notice of proposed rulemaking stated only that it "considered many alternatives contained in the proposed rule" but failed to explain the reasons why the alternatives were not pursued. So, even though EQC did consider many alternatives, the Court concluded EQC did not adequately explain them or provide reasons for why they were not pursued, and thus, EQC neither actually nor substantially complied with its obligations under ORS 468A.327(1).

The Rules Are Invalid

While acknowledging that EQC "engaged in a robust process that provided the public a great deal of transparency and numerous opportunities for engagement," the Court ultimately held that EQC did not adopt the CPP rules in compliance with ORS 468A.327(1), and therefore, the rules are invalid.

***Blue Mountains Biodiversity Project v. Trulock*, No. 2:21-CV-01033-HL, 2023 WL 6534014 (D. Or. Oct. 5, 2023)**, *summarized by* Sarah Melton, American Forest Resource Council.

U.S. District Court Judge Karin J. Immergut adopted in full and supplemented in part the Findings and Recommendation (F&R) of Magistrate Judge Andrew D. Hallman, granting summary judgement in favor of Federal Defendants on all of Plaintiff's claims. *See Blue Mountains Biodiversity Project v. Trulock*, No. 2:21-CV-01033-HL, 2023 WL 6534014 (D. Or. Oct. 5, 2023) (Order); *Blue Mountains Biodiversity Project v. Trulock*, No. 2:21-CV-01033-HL, 2023 WL 3645966 (D. Or. Apr. 27, 2023) (F&R).

Background

Plaintiff alleged that the U.S. Forest Service violated the National Forest Management Act (NFMA), National Environmental Policy Act (NEPA), and Administrative Procedure Act (APA) when approving the Camp Lick Project (Project) on the Malheur National Forest in the Middle Fork John Day River Watershed, located in northeast Oregon. The 40,000-acre Project authorizes 31,000 acres of prescribed burning and 12,220 acres of thinning, which includes treatments on 2,300 acres of riparian areas and 8,190 acres of commercial thinning.

The Project is intended and designed to improve forest health and resiliency to catastrophic wildfires, drought, insect infestations, and disease by moving forest conditions closer to the historical range of variability (HRV). Commercial harvest may include large fir trees younger than 150-years old, which requires a site-specific amendment to the Malheur National Forest Plan (Forest Plan) because of the Eastside Screens—an interim management standard prohibiting removal of trees over 21-inches diameter at breast height where the late old structure (LOS) forest is below its HRV and the proposed harvest activity is outside of the LOS. In its Forest Plan amendment, the Forest Service found that amendments were necessary to achieve its management goals because hard diameter limits would make it "difficult or impossible to achieve desired [tree] species composition." F&R at *1.

The Forest Service concluded that the Project would not significantly affect the quality of the human environment and issued its Final Decision Notice and Finding of No Significant Impact (FONSI). Plaintiff filed suit alleging the agency (1) violated NFMA by using repeated site-specific amendments to address forest-wide management concerns; and (2) violated NEPA on eight different accounts, including the scope and sufficiency of the Project's cumulative impacts analysis, analysis of baseline stream temperature data, analysis of action alternatives, and the Forest Service's decision to prepare an Environmental Assessment and not an Environmental Impact Statement (EIS). Judge Hallman recommended granting

summary judgment in favor of federal defendants on all claims and plaintiff filed two objections relating to their NFMA claim.

The Court's NFMA Analysis

Reviewing de novo the objected to portions of the F&R, the Court adopted in full and supplemented Judge Hallman's findings in favor of the Forest Service on plaintiff's NFMA claim. Plaintiff first argued that "unique site characteristics are the only evidence that can rationally support the decision to use a site-specific amendment rather than amending the Forest Plan as a whole." Order at *1 (internal quotation marks omitted). Rejecting Plaintiff's argument, Judge Immergut held that neither the text of NFMA nor the APA contain a uniqueness requirement, and that NFMA provides that "forest plans may 'be amended *in any manner whatsoever*,' so long as a proposed amendment does not amount to a 'significant change in such plan.'" *Id.* (citing 16 U.S.C. § 1604(f)(4)). Further, citing extensive support for agency deference, Judge Immergut found that "this Court cannot impose an independent uniqueness requirement on the Forest Service." *Id*.

Next, Plaintiff argued that the Forest Service's "use of site-specific amendments … constitutes a de facto significant amendment requiring an EIS" and the Forest Service was "necessarily bound to a cumulative analysis at the Forest-level scale whenever it institutes a site-specific amendment to a forest plan." *Id.* at *1, 3 (internal quotation marks omitted). Judge Immergut agreed with Judge Hallman's conclusion that "the Forest Service expressly provided that 'an amendment that applies only to one project or activity is not considered a significant change in the plan for the purposes of NFMA.'" *Id*. at *3 (citing 36 C.F.R.§ 219.13(b)(3)).

The Court's NEPA Analysis

Judge Immergut adopted in full Judge Hallman's findings in favor of the Forest Service on all eight of Plaintiff's NEPA claims, which Plaintiff did not object to. Judge Hallman found that the agency "provided a reasonable assessment of the cumulative impacts of the multiple site-specific amendments to the Eastside Screens." F&R at *11. Judge Hallman also found that there was sufficient support in the record for the Forest Service's selection of the "geographic area of every cumulative impact analysis for resources critical to biodiversity," and that Plaintiff failed to show "that using a different geographic scope for individual forest resources was arbitrary and capricious." *Id*. at *14. Judge Hallman found that the Forest Service "provided appropriate analysis of baseline stream temperatures by analyzing available data and then reanalyzing stream temperatures as more data became available," which was "especially sufficient" because the purpose was to "identify stream temperatures as a management concern." *Id.* at *15. Thus, the agency took NEPA's "required hard look at stream temperatures and analyzed sufficient baseline data." *Id*.

Judge Hallman also found that the Project's purpose and need were not unreasonably narrow, that the agency's exclusion of other action alternatives was

reasonable because they did not meet the Project's goals, and that the alternatives selected allowed the agency to take NEPA's required hard look at the commercial thinning and its effects on riparian areas. Finally, Judge Hallman found that the Forest Service was not required to conduct an EIS, deferring to the agency's conclusion that "neither the context nor the intensity of the Project warranted preparation of an EIS." *Id.* at *21. Further, the agency was not required to do an EIS for this Project given its decision to conduct an EIS for two other projects—plaintiff had "not shown a specific effect of the Project that should have been analyzed at the local level, was insufficiently analyzed, [or] could have a significant impact mandating an EIS." *Id*. at *19.

Conclusion

Plaintiff filed a notice of appeal to the Ninth Circuit Court of Appeals from Judge Immergut's Order on the F&R, Order on the Motions for Summary Judgment, Judgment, and Judge Hallman's F&R. *See Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, No. 23-3049 (9th Cir. Oct. 25, 2023).

***Central Oregon Wild Horse Coalition v. Vilsak*, No. 2:21-CV-01443-HL, 2023 WL 4456855 (D. Or. May 12, 2023), *report and recommendation adopted*, No. 2:21-CV-1443-HL, 2023 WL 7545514 (D. Or. Nov. 14, 2023),** *summarized by* Esther Westbrook, Oregon Department of Environmental Quality.

Background

The Central Oregon Wild Horse Coalition along with two individuals ("Plaintiffs") sued Tom Vilsack, Secretary of the U.S. Department of Agriculture, and several U.S. Forest Service officials ("Defendants") to challenge the Forest Service's new management plan for the Ochoco wild horse herd, the 2020 Territory Plan for the Ochoco National Forest. The management plan included a new appropriate management level ("AML"), which significantly reduced the herd size. In creating this new AML, Defendants issued an Environmental Assessment ("EA"), which identified the winter forage area as the most limiting factor affecting the herd. Plaintiffs alleged that Defendants acted in an arbitrary in capricious manner in producing the EA and determining the AML. Plaintiffs also alleged that Defendants violated the Wild Horse Act and the National Environmental Policy Act ("NEPA") by failing to consider the unique genetic makeup of the herd.

The parties filed cross motions for summary judgment. On May 12, 2023, U.S. Magistrate Judge Andrew Hallman issued Findings and Recommendation, recommending that the District Court grant Defendants' Motion and deny Plaintiffs' Motion. On November 14, 2023, U.S. District Judge Michael H. Simon issued an order reviewing the magistrate's decision.

Analysis

The Court reviewed *de novo* each of the magistrate's findings that Plaintiffs objected to. First, Plaintiffs argued that Defendants used unreliable data, specifically winter 2008 and 2017 surveys, in setting the winter forage area, and acted in an arbitrary and capricious manner in rejecting Plaintiffs' evidence of horse sightings outside this area. The Court adopted Judge Hallman's finding that the Forest Service adequately explained and supported its methodology for assessing the winter forage area and rejection of Plaintiffs' contradictory data.

Second, Plaintiffs objected that the new AML (the reduced count for the herd) was itself arbitrary and capricious because Defendants did not properly consider various facts regarding the herd's size and history. Plaintiffs asserted that Judge Hallman oversimplified their argument as merely focusing on horse survival, when Plaintiffs argued that the Forest Service did not have an accurate count until recently and did not sufficiently understand how well the horses co-existed with other managed resources. The court found that Judge Hallman had adequately addressed Plaintiffs' argument and thus adopted Judge Hallman's rejection of Plaintiffs'

challenge to the new AML based on the agency's application of the best available science.

Third, Plaintiffs objected that Defendants' failure to consider the unique genetic makeup of the herd violated the Wild Horse Act and NEPA because the herd is biologically distinct and the Forest Service's plan to reduce the herd and interbreed it with other herds would cause irreparable harm. Again, the Court found that Judge Hallman had adequately addressed these arguments. The Court therefore adopted Judge Hallman's findings that Plaintiffs had failed to show how their evidence of genetic uniqueness should alter the Wild Horse Act's mandate to remove excess horses; the agency had relied on sufficient scientific support for its determinations; and the management plans addressed Plaintiffs' viability concerns.

Finally, the Court briefly discussed several other arguments made by Plaintiffs: that NEPA required the Forest Service to conduct an environmental impact statement, rather than an EA, because the proposed action posed a risk of causing the herd to go extinct and because the proposed action was "controversial" under NEPA; and that the Forest Service had made its decision and then selected evidence to support it, which would create a harmful precedent. For each of these arguments, the Court summarily concluded that the magistrate had adequately addressed them, found no error, and adopted his reasoning.

Conclusion

The Court adopted the magistrate's Findings and Recommendation, granted Defendants' Motion for Summary Judgment, and denied Plaintiffs' Motion for Summary Judgment. Plaintiffs filed a notice of appeal to the Ninth Circuit. *See Cent. Or. Wild Horse Coal. v. Vilsack*, No. 23-4260, 2023 WL 7545514 (9th Cir. Dec. 19, 2023).

***Juliana v. United States*, No. 6:15-CV-01517-AA, 2023 WL 9023339 (D. Or. Dec. 29, 2023),** *summarized by* Dallas DeLuca, Markowitz Herbold PC.

Introduction

In the ninth written opinion since this case was filed in August 2015, Senior Judge Anne Aiken granted in part and denied in part Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint in this historic case. *Juliana v. United States*, No. 6:15cv-01517-AA, 2023 WL 9023339 (D. Or. Dec. 29, 2023) ("*Juliana IX*"). In its ruling, the Court followed precedent set by *Obergefell v. Hodges*, 576 U.S. 644 (2015) that new constitutional rights can develop over time and found "that the right to a climate system that can sustain human life is fundamental to a free and ordered society." *Id.* at *17. This is not a right that can be used as a basis to sue for just any pollution that the government causes, but can be used, as here, where plaintiffs allege "pollution and climate change on a catastrophic level[.]" *Id.* Channeling Rachel Carson and Ralph Nader, the Court stated that "[t]o hold otherwise would be to say that the Constitution affords no protection against a government's knowing decision to poison the air its citizens breathe or the water its citizens drink." *Id.*

Procedural History

Plaintiffs are youth residing in several western states, including Oregon, along with a nonprofit association of youth climate activities, and Dr. James Hansen (formerly of NASA) in the role of guardian of future generations. Plaintiffs allege that catastrophic climate change caused by emissions of carbon dioxide was a violation of their constitutional rights. Among other allegations, Plaintiffs claim that Defendants' actions exposed Plaintiffs to the dangers of climate change, which they allege is a violation of their substantive due process rights to life, liberty, and property, and a violation of the obligation to hold natural resources in trust for future generations.

After the district court denied Defendants' initial motion to dismiss and found Plaintiffs had standing, *Juliana v. United States*, 217 F. Supp. 3d 1224, 1247 (D. Or. 2016) ("*Juliana I*"), the Ninth Circuit issued an opinion reversing the district court, *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020) ("*Juliana VII*"). The Ninth Circuit affirmed the district court's finding that at least some of the plaintiffs had adequately alleged injury-in-fact and causation. However, over a dissent, it concluded that Plaintiffs' claims were not redressable by a federal court and thus plaintiffs lacked Article III standing, remanding the case with instructions to dismiss.

Subsequently, in *Juliana v. United States*, No. 6:15-CV-01517-AA, 2023 WL 3750334 (D. Or. June 1, 2023) ("*Juliana VIII*"), the district court granted Plaintiffs' motion for leave to file a second amended complaint, relying on *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021) (Thomas, J.), which was issued

after the Ninth Circuit's opinion. *See Uzuegbunam*, 141 S. Ct. at 806 (Roberts, C.J.) (dissent) (stating decision is "a radical expansion of the judicial power"); *see also ENR Case Notes* Vol. 46 at 5 (Aug. 2023) (summarizing *Juliana VIII*). Thereafter, Plaintiffs filed a Second Amended Complaint and Defendants filed a Motion to Dismiss for lack of subject matter jurisdiction and failure to state a claim.

The Court's Analysis of Defendants' Motion to Dismiss

Before analyzing Defendants' arguments, Judge Aiken made clear that she is staking out new ground in jurisprudence. She noted that some jurists may disagree with her approach, quoting the Ninth Circuit in *Juliana VII* for its opinion that sometimes "'even a clear and present danger . . . can[not] be solved by federal judges.'" *Id.* at *3 n.13. But given the drastic nature of the climate change problem, she agreed with certain legal scholars, the Montana Supreme Court, and the Australian Supreme Court that "[t]he legal approach must 'rise to the emergency rather than repeat a failed paradigm of the past'" to "provide redress for the irreparable harm government fossil fuel promotion has caused." *Id.* at *1–2. To set the groundwork for the Court's authority to "rise to the emergency," the opinion was grounded in the earliest authority possible: *Marbury v. Madison*, 5 U.S. 137 (1803), *The Federalist Papers*, and the judiciary's status as a co-equal branch of government under the Constitution for the court's power to "say what the law is[,]" "decide on the rights of individuals" and "render reasoned judgment." *Id.* at *2–3.

1. *Subject Matter Jurisdiction*[1]

Defendants first challenged subject matter jurisdiction by arguing that the Ninth Circuit's opinion in *Juliana VII* required the district court to dismiss this case on remand. In response, the District Court explained that Ninth Circuit precedent provides that if an appellate judgment does not expressly foreclose allowing amendments to the pleadings, a district court is allowed to do so. *Id.* at *8. The Court then noted that the Ninth Circuit had neither addressed whether Plaintiffs' pleading deficiency could be cured by amendment nor explicitly foreclosed it from allowing an amended complaint. *Id.*

Next, Defendants challenged Plaintiffs' standing to bring their claims. In *Juliana VII*, a divided Ninth Circuit panel held that the injunctive relief sought by Plaintiffs in their First Amended Complaint failed to meet the redressability requirement for Article III standing because it was beyond the power of the courts. *Id.* at *4–5 (describing *Juliana VII*). Here, Plaintiffs' Second Amended Complaint

[1] The Court briefly noted that Defendants are preserving their argument that Plaintiffs' claims must be dismissed because they failed to first raise their claims under the Administrative Procedure Act. The Court again, like the Ninth Circuit, rejected Defendants argument. *Id.* at *21.

sought declaratory relief as well as injunctive relief that was narrower than the injunctive relief sought in the prior operative complaint. *See id.* at *6 & n.16. The District Court first analyzed the request for injunctive relief and concluded that the relief was "substantially likely" to redress the injuries, even if much of the allegations needed to be proved at a later evidentiary hearing. *Id.* at *10. However, the Court concluded that the injunctive relief sought was still beyond the power of the Court to grant.[2]

For declaratory relief, the Court revisited its decision in *Juliana VIII* where it granted Plaintiffs leave to file a Second Amended Complaint, concluding that a declaration alone could be sufficient to redress Plaintiffs' harms. Here, the Court reached the same conclusion, relying on Supreme Court cases as well as cases from the Ninth Circuit and District of Oregon concerning tribal treaty fishing rights and court oversight of multi-party management of fish resources. *Id.* at *13–15.

Finally, the Court reiterated its prior ruling that this action has not "presented a political question under" Supreme Court precedent, which the Ninth Circuit previously agreed with. *Id.* at *15. The Court explained that a ruling here is within "the function of the court . . . to declare what the law is[,]" rejecting Defendants' assertion that the court would be making policy. *Id; see also id.* ("At its heart, this lawsuit asks the court to determine whether defendants have violated plaintiffs' constitutional rights.").

2. Failure to State a Claim

a. Substantive Due Process Claim

The Court first analyzed whether Plaintiffs have a valid substantive due process claim. Plaintiffs' due process claim asserts that the government's "affirmative aggregate acts have been and are infringing on plaintiffs' liberties, by knowingly creating a destabilized climate system that is causing irreversible harm." *Id.* at *16.

As to affirmative government action, the Court relied on *Obergefell v. Hodges*, 576 U.S. 644 (2015), for the proposition that "'new' fundamental rights are not out of bounds." *Id.* at 16. It found "that the right to a climate system that can sustain human life is fundamental to a free and ordered society." *Id.* at *16–17. However, the opinion cabined this right to allegations of "pollution and climate change on a catastrophic level" where, if the government remains unchecked, its actions will "permanently and irreversibly damage plaintiffs' property, their economic livelihood, their recreational opportunities, their health, and ultimately their (and their children's) ability to live." *Id.* at *17. On that basis, the Court denied

[2] It left the door open to a further amendment to the complaint for narrower injunctive relief, noting that the Second Amended Complaint sought injunctive relief beyond what the Ninth Circuit would allow under *Juliana VII*. *Id.* at *12.

Defendants' Motion to Dismiss Plaintiffs' due process claim as to affirmative government action. *Id.* at *17.

As to government inaction, the Court noted that normally "the Due Process Clause imposes no duty on the government to protect persons from harm inflicted by third persons that would violate due process if inflicted by the government." *Id.* at *18. The Court then concluded that Plaintiffs adequately alleged all three criteria to meet the high bar for the exception to that rule. *Id.* *19. Accordingly, it also denied Defendants' motion as to government inaction.

b. Equal Protection Claim

The Court then turned to Plaintiffs' Equal Protection Clause claim, which seeks to invalidate "federal laws and actions that disproportionately discriminate against them." *Id.* Based on Ninth Circuit and Supreme Court precedent, the Court found that "age is not a suspect class," and thus dismissed Plaintiffs' Equal Protection Clause claim. *Id.* at *19. In doing so, the Court stated that it "would not be persuaded to break new ground in this area" even if not foreclosed by precedent. *Id.*

c. Ninth Amendment Claim

The Court quickly disposes of Plaintiffs' Ninth Amendment claim, agreeing with Defendants that the "Ninth Amendment has never been recognized as independently securing any constitutional right." *Id.* at *20.

d. Public Trust Doctrine Claim

Plaintiffs' public trust claim alleges that the federal government has a duty to "take affirmative steps" to protect the climate system, including "our atmosphere, waters, oceans, and biosphere." *Id.* Defendants contend that the public trust doctrine is state-law doctrine that applies only to state-owned property" and that the "'climate system'" is not part of any federal public trust. *Id.* The Court noted that the Ninth Circuit did not address this issue in *Juliana VII* and thus reiterated and incorporated its prior rulings that the federal government holds the territorial seas (over which only the federal government has authority) in public trust. *Id.* at *21.

Subsequent Filings and Conclusion

On February 2, 2024, Defendants filed a writ of mandamus asking that the Ninth Circuit to direct the District Court to dismiss the action without leave to amend. Case No. 24-684, Dkt. 1.1. Defendants' writ of mandamus makes a number of arguments, including that the District Court "flatly mischaracterized" the Ninth Circuit's decision. Defendants also filed a short motion to stay the district court proceedings pending its writ of mandamus.

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This litigation has been ongoing for eight and a half years, requiring significant investment of time and resources by the District Court. *See Juliana IX* at *7, 21. This latest decision concluded with a statement that with each passing year climate change impacts increase and the chances to mitigate them dwindle, and the courts "can no longer abdicate responsibility to apply the rule of law" to claims about climate change. *Id.* at *21. We should expect that *Juliana IX* will be followed by more decisions both before and after trial, if there is a trial.

***Northwest Environmental Advocates. v. United States Fish & Wildlife Service*, No. 3:18-CV-01420-AR, 2023 WL 7181694 (D. Or. Sept. 15, 2023), *report and recommendation adopted*, No. 3:18-CV-01420-AR, 2023 WL 8190727 (D. Or. Nov. 27, 2023),** *summarized by* Allison Rothgeb, Markowitz Herbold PC.

Introduction

In this case before Magistrate Judge Armistead in the District of Oregon, Plaintiff, Northwest Environmental Advocates ("NWEA"), alleged that Defendants, United States Fish and Wildlife Service ("FWS") and United States Environmental Protection Agency ("EPA"), violated the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, and the Endangered Species Act ("ESA") 16 U.S.C. § 1531 *et seq*. NWEA challenges FWS's 2012 Oregon biological opinion (BiOp) and EPA's subsequent approval of Oregon's proposed water quality standards (WQS) criteria for toxic pollutants.

Oregon bull trout is a threatened species under the ESA, and NWEA's claims center on potentially harmful concentrations of zinc, arsenic, and selenium allowed in its habitat. NWEA alleges that FWS failed to use the best available science in reaching its conclusion that Oregon's revised water quality criteria for chronic exposure to arsenic, chronic exposure to selenium, and acute and chronic exposure to zinc would not cause jeopardy to bull trout or result in adverse modification of its critical habitat. NWEA asserts that the agencies erred in reaching a "no jeopardy" decision with respect to acute arsenic and acute and chronic zinc levels in the 2012 BiOp.

NWEA brings one claim against FWS under the APA, alleging that FWS failed to use the best available science and that portions of the BiOp are arbitrary and capricious. NWEA brings three claims against EPA under the ESA citizen suit provisions, alleging that EPA's actions were arbitrary and capricious when it: (1) approved Oregon's proposed WQS; (2) failed to re-initiate consultation with FWS when it learned new information in 2015 about the effects of arsenic and zinc on bull trout; and (3) failed to consult with FWS in April 2014 before approving Oregon's revised freshwater acute and chronic selenium criteria.

Procedural Posture

This matter was before the court on cross motions for summary judgment. The Motions centered on whether EPA and FWS properly followed their legal obligations under the APA when they approved changes in permissible concentrations of zinc, arsenic, and selenium in Oregon's WQS. NWEA asserted that the agencies' actions were arbitrary and capricious. In its Findings and Recommendation, the Magistrate Judge gave substantial deference to FWS and EPA pursuant to the APA, and recommended that NWEA's motion be denied. The

***Northwest Environmental Advocates. v. United States Fish & Wildlife Service*, No. 3:18-CV-01420-AR, 2023 WL 7181694 (D. Or. Sept. 15, 2023), *report and recommendation adopted*, No. 3:18-CV-01420-AR, 2023 WL 8190727 (D. Or. Nov. 27, 2023),** *summarized by* Allison Rothgeb, Markowitz Herbold PC.

Findings and Recommendation further recommended that FWS and EPA's Cross-motion for Summary Judgment should be granted. The District Court adopted the Magistrate Judge's Findings and Recommendation with no changes.

The District Court's Analysis

FWS issued the Oregon BiOp in 2012 for EPA's approval of Oregon's revised WQS for acute and chronic arsenic and zinc. The BiOp concluded that EPA's approval of the revised WQS would cause "no jeopardy" to bull trout and would not destroy or adversely modify its designated critical habitat. The BiOp also concluded that bull trout exposure to the revised WQS would only result in an incidental take of bull trout. Based largely on the BiOp, the EPA partially approved Oregon's revised WQS criterial for toxic pollutants in 2013, and subsequently approved other revised criterial in 2014.

In 2015, FWS issued a BiOp for revisions to Idaho's WQS criteria for toxic pollutants, including chronic arsenic and acute and chronic zinc and the same or more stringent concentrations as those approved in Oregon. In the Idaho BiOp, FWS concluded that Idaho's proposed WQS criterial for chronic arsenic and acute and chronic zinc were likely to jeopardize the continued existence of bull trout.

In evaluating the parties' cross motions for summary judgment, the Court noted that the ESA does not provide its own standard of judicial review, so agency decisions under the ESA are reviewed under the APA's arbitrary and capricious standard. *See Bennett v. Spear*, 520 U.S. 154, 158 (1997). Section 706(a)(2) of the APA requires a court to uphold agency action on review unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A).

1. APA Claim Against FWS

NWEA's first claim against FWS alleges that portions of its 2012 Oregon BiOp are arbitrary and capricious because NWEA alleges that FWS failed to use the best available science. The Court noted that "[t]he ESA requires an agency to use 'the best scientific and commercial data available' when formulating a BiOp[,]" and an agency's failure to use the best available scientific data violates the APA. *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 995 (9th Cir. 2014) (*Locke*) (quoting 16 U.S.C. § 1536(a)(2)); *see also* 50 C.F.R. § 402.14(g)(8). "An agency complies with the best available science standard so long as it does not ignore available studies, even if it disagrees or discredits them." *Locke*, 776 F.3d at 996 (citations omitted).

***Northwest Environmental Advocates. v. United States Fish & Wildlife Service*, No. 3:18-CV-01420-AR, 2023 WL 7181694 (D. Or. Sept. 15, 2023), *report and recommendation adopted*, No. 3:18-CV-01420-AR, 2023 WL 8190727 (D. Or. Nov. 27, 2023),** *summarized by* Allison Rothgeb, Markowitz Herbold PC.

First, NWEA argued that FWS failed to use the best available science in the 2021 Oregon BiOp because it ignored field studies and failed to adequately consider indirect effects like diet, bioaccumulation, and sediment, when assessing chronic arsenic and zinc toxicity on bull trout. NWEA argued that the field studies represented the best available science because the Idaho BiOp relied on them. In response, FWS argued that it considered indirect effects in other ways—such as EPA's biological evaluation—that included diet, bioaccumulation, and bioconcentration when considering toxicity of arsenic on bull trout. FWS did not include the studies cited by NWEA because they involved multiple contaminants or chemical mixtures. FWS argued that those studies also suffered flaws, were not superior data, and, therefore, its evaluation was reasonable. The Court agreed and found that it was not the Court's role to weigh competing scientific studies. Further, "[t]he determination of what constitutes the best scientific data available belongs to the agency's special expertise and warrants substantial deference." *Friends of Santa Clara River v. U.S. Army Corps of Eng'rs*, 887 906, 924 (9th Cir. 2019) (quotations omitted).

Second, NWEA argued that FWS failed to use the best available science because it relied primarily on statistical modelling in the Oregon BiOp. NWEA's argument was based, in part, on the 2015 Idaho BiOp. The Court found that NWEA could not rely on the Idaho BiOp as evidence that the Oregon BiOp is flawed because it is well settled that 'post-decisional information may not be advanced as a new rationalization for attacking an agency's decision." *Ctr. for Biological Diversity v. U.S. Fish and Wildlife Serv.*, 450 F.3d 930, 944 (9th Cir. 2006) (simplified). The Court further concluded that NWEA failed to demonstrate that FWS acted arbitrarily, or failed to use the best available science with the modeling program it selected.

NWEA also alleged that the BiOp is arbitrary and capricious in three other ways: (1) FWS erroneously relied on an exposure-based approach when considering effects, instead of considering that the WQS would be applied state-wide; (2) FWS erroneously concluded that bull trout would move through concentrations of arsenic and zinc in the high-flow mainstem Columbia and Snake Rivers; and (3) FWS failed to adequately consider bull trout recovery in its jeopardy analysis. The Court considered whether FWS's actions were arbitrary and capricious and examined whether FWS considered relevant factors and "articulate[d] a satisfactory explanation for its action, including a rational connection between the facts found and the agency's conclusions." *NWEA v. U.S. EPA*, 855 F.Supp. 2d 1199, 1204 (D. Or. 2012). For each of NWEA's allegations, the Court examined the facts and data relied on by FWS and concluded that the agency articulated a rational connection between the facts found and its decision that the proposed action would not

appreciably impair bull trout recovery. The Court further noted that while NWEA would have preferred the methodology and data used in the 2015 Idaho BiOp, the Court could not say that FWS failed to consider important factors or failed to supply satisfactory explanations for its conclusions.

The Court concluded that FWS's 2012 Oregon BiOp was not arbitrary or capricious and FWS did not fail to use the best available science. The Court denied NWEA's motion for summary judgment on this claim and granted FWS's cross-motion.

2. ESA Claims Against EPA

NWEA also brought three citizen-suit claims under the ESA against EPA, contending that: (1) because the 2012 Oregon BiOp was arbitrary and capricious, EPA violated ESA Section 7 by relying on the legally flawed BiOp; (2) EPA was required to reinitiate formal consultation after the 2015 BiOp issued to reconcile the jeopardy determination for bull trout with Oregon's "no jeopardy determination"; and (3) EPA's approval of revised selenium criteria in 2014 violated its duty to reinitiate formal consultation. The Court noted that citizen-suit claims brought under the ESA are analyzed under the APA's arbitrary and capricious standard of review. 5 U.S.C. § 706(2)(A); *Ctr. for Biological Diversity v. Bernhardt*, 982 F.2d 723, 733 (9th Cir. 2020).

With respect to NWEA's first claim against EPA (Claim Two), the Court noted that if it had found that any portion of the Oregon BiOp was arbitrary and capricious, as a matter of law, EPA would violate Section 7 by relying on the legally flawed BiOp. However, since the BiOp was neither legally nor factually flawed, EPA permissibly relied on it in approving Oregon's toxics criteria. Accordingly, the Court recommended denial of NWEA's motion and granting EPA's cross-motion.

NWEA's second claim against EPA alleged that when FWS issued a BiOp concluding that Idaho's proposed water quality criterial for chronic arsenic and acute and chronic zinc at the identical concentrations previously approved for Oregon would cause jeopardy to bull trout and its critical habitat, this triggered EPA's duty to reinitiate consultation under 50 C.F.R. § 402.16(a)(2). NWEA argued that the Idaho BiOp was new information. EPA argued that the Idaho BiOp did not contain any new information that FWS failed to consider when formulating the Oregon BiOp. The Court determined that EPA's decision not to reinitiate consultation was entitled to deference because the record showed that FWS considered the updated information in the 2015 Idaho BiOp, but nonetheless concluded that the new information would not change the effects analysis and jeopardy determination in the Oregon BiOp. The Court found that this

determination was entitled to deference and nothing in the record showed that EPA disagreed with FWS's determination. Accordingly, the Court recommended denying NEWA's motion for summary judgment and granting EPA's cross-motion.

Finally, NWEA's third claim against EPA asserted that EPA was required to consult before it approved Oregon's revised freshwater selenium criteria in 2014 because its approval may affect bull trout or other listed species. Defendants argued that EPA correctly determined that approval of the revised selenium criteria would have no effect because the criteria were more protective for bull trout and, therefore, consultation was not required. The Court agreed with Defendants and found that EPA's no effect determination was reasonable. Accordingly, the Court recommended denial of NWEA's motion on this claim and granting defendants' cross-motion.

Conclusion

In sum, the District Court approved the Findings & Recommendation granting Defendants' Cross Motion for Summary Judgment.