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Jessica Bernardini &
Hannah Goldblatt, Editors

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.

A special thank you to our talented contributors: Aidan Freeman, Marten Law LLP; Greg Allen, Saalfeld Griggs, PC; Hannah Goldblatt, Advocates for the West; Sarah Melton, American Forest Resource Council.

If you are interested in contributing to future editions, please contact the editors:

Jessica Bernardini, jessica.bernardini@tonkon.com
Hannah Goldblatt, hgoldblatt@advocateswest.org

OREGON COURT OF APPEALS

Sunshine Farm, LLC v. Glaser,
331 Or. App. 429 (Mar. 6, 2024)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

Blue Mountains Biodiversity Project v. Wilkes, et. al.,
No. 1:22-CV-01500-CL, 2024 WL 1345682 (D. Or. Mar. 29, 2024)

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Klamath Tribes v. United States Bureau of Reclamation,
No. 1:22-CV-00680-CL, 2024 WL 472047 (D. Or. Feb. 7, 2024)

***Sunshine Farm, LLC v. Glaser*, 331 Or. App. 429 (Mar. 6, 2024);** *summarized by* Aidan Freeman, Marten Law LLP.

Background

Oregon's timber trespass statutes, which have been a part of Oregon law since the mid-19th century, provide double and treble damages for the trespassory cutting of trees when such trespass is casual or willful, respectively. In 1925, the statutes were amended to allow for damages to "produce" and injuries beyond just cutting timber. However, the precise limits of the timber trespass cause of action with respect to nontraditional injuries has long been questioned. In two decisions in the 1970s, the Oregon Supreme Court held that passive "chemical drift" from a defendant's property injuring crops on a plaintiff's land does not fall within the statute. In the present case, a limited liability company operating a hemp farm alleged casual timber trespass against a neighboring property owner for spraying pesticides that drifted from the neighbor's land to the hemp farm, destroying the crops and rendering the soil unsuitable.

Procedural History

Plaintiff alleged several causes of action in its amended complaint, including a casual timber trespass claim under ORS 105.815 and a negligence *per se* claim. In a limited judgment following Defendants' Oregon Rules of Civil Procedure 21(A)(1)(h) motion to dismiss for failure to state a claim, the trial court dismissed the negligence *per se* and timber trespass claims. Plaintiff initially appealed both dismissed claims, but later withdrew its negligence *per se* arguments because of a lack of appellate jurisdiction.

Chemical Drift Trespass Claim

The Oregon Supreme Court has twice held the timber trespass statutes did not apply to damages to crops caused by chemical spray that drifted onto neighboring land. *Meyer v. Harvey Aluminum*, 263 Or. 487, 498–99 (1972); *Chase v. Henderson*, 265 Or. 431, 432 (1973). In the present case, Plaintiff urged the Court to follow a more recent decision, *Worman v. Columbia County*, 223 Or. App. 223 (2008), and cabin *Meyer* and *Chase* within their facts. Reading *Worman* broadly, Plaintiff argued the timber trespass statute allows for multiple damages for passive drift of chemical spray, and that *Meyer* and *Chase* rest on "shaky reasoning" and should not be interpreted to create a blanket bar on multiple damages for chemical drift. *See* Appellant's Reply Brief, *Sunshine Farm, LLC v. Glaser*, 2022 WL 18281067 at *4 (Sept. 16, 2022).

In *Meyer*, the Court held that the timber trespass statutes did not apply to drifting fumes emitted from the defendant's aluminum manufacturing facility. 263 Or. at 498–99. The Court reasoned that the deterrence goals of the statutes would not be served by applying multiple damages to injuries caused by migrating fumes. *Id.* at

498. In *Chase*, the Court cited "the same considerations" as in *Meyer* and held that the statutes did not apply to injuries to a bean crop damaged by chemical spray that drifted after being applied via helicopter to a nearby pasture. 265 Or. at 432. The Oregon Court of Appeals in *Worman* distinguished the facts at issue there from those in *Meyer* and *Chase*, holding that multiple damages could be applied to injuries stemming from the *direct* spraying of herbicide on the plaintiffs' property by the defendants. 223 Or. App. at 238–39.

In the present case Plaintiff argued *Worman* did not strictly distinguish between direct chemical application and chemical drift. But the Court refused to follow Plaintiff's broad reading of *Worman*, and thus refused to apply the timber trespass statutes to multiply damages available for merely passive chemical drift injuries. However, the Court recognized that *Meyer* and *Chase* did not follow the Supreme Court's current method of statutory interpretation, and that their holdings may not pass muster were the Court to rule on the same issues today. The Court noted that Plaintiff "would have the better argument" under the bare text of the timber trespass statutes, but that it was bound to follow *Meyer* and *Chase*—signaling that whether "chemical drift" falls under the statutes is a "question for the Supreme Court to answer." 331 Or. App. at 437.

Independent Cause of Action

Though Plaintiff had dropped its negligence *per se* argument on appeal, the Court addressed a component of that argument claiming the timber trespass statutes create an implied cause of action. *See* Appellant's Opening Brief, *Sunshine Farm, LLC v. Glaser*, 2022 WL 18284227 at *15 (Mar. 8, 2022). The Court rejected this argument, holding that ORS sections 105.810 and 105.815 do not establish a separate "timber trespass" cause of action independent of the doubling or tripling of damages under a pre-existing cause of action. 331 Or. App. at 436–37.

Remedy and Subsequent History

Relying on *Meyer* and *Chase*, the Court affirmed the trial court's dismissal of Plaintiff's timber trespass claim.

In April 2024, Plaintiff filed a petition for Oregon Supreme Court review.

***Blue Mountains Biodiversity Project v. Wilkes, et. al.*, No. 1:22-CV-01500-CL, 2023 WL 8809669 (D. Or. Apr. 27, 2023), *report and recommendation adopted*, No. 1:22-CV-01500-CL, 2024 WL 1345682 (D. Or. Mar. 29, 2024);** *summarized by* Sarah Melton, American Forest Resource Council.

On April 27, 2023, Magistrate Judge Mark Clarke with the U.S. District Court for the District of Oregon issued a Findings and Recommendation in the challenge to the land management plan amendment known as the "Eastside Screens Amendment", which is, in part, a new guideline permitting the cutting of certain larger trees under limited circumstances in National Forests in eastern Oregon and southern Washington. This case came before the Court on Defendants' Motion to Dismiss. The Court recommended denying Defendants' Motion to Dismiss under Fed. R. Civ. Pro. 12(b)(6), for failure to state a claim. *Blue Mountains Biodiversity Project v. Wilkes,* No. 1:22-CV-01500-CL, 2023 WL 8809669 (D. Or. Apr. 27, 2023).

Plaintiffs alleged that the National Forest Management Act and the Administrative Procedure Act were violated because (1) Defendants approved the Eastside Screens Amendment without providing for an objection process in violation of 36 C.F.R. § 219.51(b); (2) Defendants failed to provide an explanation for why the Eastside Screens Amendment was not subject to the objection process in violation of 36 C.F.R. § 219.51(d); and (3) Defendants approved the South Warner Project, which authorizes the logging trees greater than 21 inches in diameter, based on the Eastside Screens Amendment and in violation of the original Eastside Screens.

Defendants argued that Plaintiff's claims should be dismissed because they are based on an incorrect and non-cognizable legal theory that the U.S. Department of Agriculture's regulations require the Department of Agriculture to hold an objection period for a U.S. Forest Service decision that was signed by the Secretary of Agriculture or the Under Secretary for Natural Resources and Environment ("Under Secretary")—here, the Decision Notice for the Eastside Screens Amendment.

Specifically, Defendants argued that decisions by the Under Secretary are "proposed" by the Under Secretary and not subject to an objection process, citing the relevant regulation, 36 C.F.R. § 219.51(b), which states, in part, that plans, plan amendments, or plan revisions that are proposed by the Under Secretary are not subject to objection procedures, and that a decision by the Under Secretary constitutes the final administrative determination of the Department of Agriculture.

The Court found that the plain language of the regulation is clear and unambiguous, holding that Defendants were conflating "proposed" with "decision" and that a decision by the Under Secretary is not necessarily a proposal: "when the Under Secretary is not involved with a proposed plan amendment . . . [they] cannot later retroactively claim that the Under Secretary proposed that plan amendment by simply signing the [proposed plan amendment's] Decision Notice." *Wilkes*, 2023 WL 8809669, at *3 (D. Or. Apr. 27, 2023).

***Blue Mountains Biodiversity Project v. Wilkes, et. al.*, No. 1:22-CV-01500-CL, 2023 WL 8809669 (D. Or. Apr. 27, 2023), *report and recommendation adopted*, No. 1:22-CV-01500-CL, 2024 WL 1345682 (D. Or. Mar. 29, 2024);** *summarized by* Sarah Melton, American Forest Resource Council.

Further, the Court held, neither would the plain meanings of "proposal" and "decision" support Defendants' arguments because "a proposal is something offered for consideration, and a decision is a determination made after consideration of a proposal," and therefore cannot plausibly refer to the same action. *Id.*, at *4.

On March 29, 2024, Judge Ann Aiken with the U.S. District Court for the District of Oregon, Medford Division, adopted in full Magistrate Judge Clarke's Findings and Recommendation, denying Defendants' Motion to Dismiss and holding that Plaintiff plausibly alleged violations of law in asserting that "the Under Secretary's signature on a decision notice does not exempt a lower ranking official's proposed plan amendment from the objection process." *Blue Mountains Biodiversity Project v. Wilkes*, No. 1:22-CV-01500-CL, 2024 WL 1345682, at 1 (D. Or. Mar. 29, 2024); *see also Wilkes*, 2023 WL 8809669, at *5 (D. Or. Apr. 27, 2023) ("If the Under Secretary wishes to exempt a proposed plan amendment under Section 219.51(b), the Under Secretary must be involved with the proposal before signing a decision notice.").

***Greater Hells Canyon v. Wilkes*, No. 2:22-CV-00859-HL, 2024 WL 1344067 (D. Or. Mar. 29, 2024);** *update by* Hannah Goldblatt, Advocates for the West.

This case also involves the Eastside Screens Amendment; this most recent opinion was issued by Judge Aiken on the same day as *Blue Mountains Biodiversity Project v. Wilkes, et. al.*, No. 1:22-CV-01500-CL, 2024 WL 1345682 (D. Or. Mar. 29, 2024).

Case Notes Volume 47 summarized the Findings & Recommendation issued by Judge Hallman last August, which recommended granting Plaintiffs' motion for summary judgment and finding the Forest Service violated the National Forest Management Act ("NFMA") and the National Environmental Policy Act ("NEPA)" in its decision amending the Eastside Screen's 21-inch standard. *See* Case Notes Vol. 47 at 2–3; *Greater Hells Canyon Council v. Wilkes*, No. 2:22-CV-00859-HL, 2023 WL 6443823 (D. Or. Aug. 31, 2023).

Judge Aiken adopted Judge Hallman's Findings & Recommendation in full and issued an order requiring the Forest Service to prepare an Environmental Impact Statement for the Eastside Screens Amendment, vacating the Forest Service's Environmental Assessment and Finding of No Significant Impact, and ordering that the Forest Service maintain the "snag and green tree retention" portions of the Amendment while it prepares its Environmental Impact Statement.

***Tribes v. United States,* No. 1:22-CV-00680-CL, 2023 WL 7182281 (D. Or. Sept. 11, 2023), *report and recommendation adopted sub nom. Klamath Tribes v. United States Bureau of Reclamation,* No. 1:22-CV-00680-CL, 2024 WL 472047 (D. Or. Feb. 7, 2024)**; *summarized by Greg Allen*, Saalfeld Griggs, PC.

This case is part of a much longer and larger dispute regarding the water rights of the Klamath Tribes ("Tribes") and the endangered suckerfish in the Upper Klamath Lake ("Lake"). This case in particular came about as a result of a historic drought from 2020 to 2022. Magistrate Judge Mark D. Clarke filed a Findings and Recommendation ("F&R") on September 11, 2023, recommending the Court grant Plaintiff's motion for summary judgment. The Court reviewed the matter *de novo*, found no error, and concluded the report was correct.

Background

The suckerfish have historically been and continue to be an important food source and cultural resource for the Tribes. In 1864, the Tribes entered into a treaty with the United States in which the Tribes ceded their vast territory in exchange for reserved hunting and fishing rights, including the right to prevent appropriators from depleting water levels from the Lake to a level that could not support the various life stages of the suckerfish.

In 1902, the Bureau of Reclamation ("Reclamation") initiated the Klamath Project, which sought to divert and allocate water resources from the Lake and surrounding wetlands for irrigation purposes, leading to the decline of the suckerfish. Currently, Reclamation uses the Lake as a reservoir and diverts water for multiple, competing downstream interests, including Tribal water and fishing rights, endangered suckerfish, and irrigation, the latter of which is subservient to the Tribal rights and the suckerfish.

The Fish and Wildlife Service ("FWS") issued a Biological Opinion ("BiOp") in 2019, stating that Reclamation's operations were not likely to jeopardize the suckerfish or adversely modify its designated critical habitat. In 2020, FWS issued a supplemental BiOp to evaluate Reclamation's plan to release additional water. FWS still found no jeopardy, but also found that the increased releases would have adverse effects on the suckerfish's critical habitat. FWS included an Incidental Take Statement ("ITS") that was conditioned on the Lake's water level staying above certain levels to prevent further harm to the suckerfish.

From 2020 to 2022, the region suffered an unprecedented drought, bringing Lake levels lower than conceived of by the 2020 BiOp. Reclamation proposed a Temporary Operating Procedure ("TOP") that attempted to balance the competing needs given the scarcity of water that still included irrigation. The Tribes sued Reclamation under the Endangered Species Act ("ESA") Sections 7 and 9 and the National Environmental Policy Act ("NEPA"). The Magistrate Judge filed an F&R granting the Tribes' motion for summary judgment. Reclamation objected on the

***Tribes v. United States,* No. 1:22-CV-00680-CL, 2023 WL 7182281 (D. Or. Sept. 11, 2023), *report and recommendation adopted sub nom. Klamath Tribes v. United States Bureau of Reclamation,* No. 1:22-CV-00680-CL, 2024 WL 472047 (D. Or. Feb. 7, 2024)**; *summarized by Greg Allen*, Saalfeld Griggs, PC.
grounds described below, and the District Court, reviewing *de novo*, upheld the F&R in full.

Standing

Reclamation first argued that the Tribes did not have a redressable injury because the TOP would eventually expire. The Court held that drought would continue to impact water resources for the foreseeable future, and that the Tribes' injury is ongoing, regardless of when the TOP expires.

Mootness

Reclamation next argued that the Tribes' claim did not fall under the "capable of repetition, yet evading review" exception to mootness because since the start of the litigation, there was a new TOP and a new BiOp, and thus the same controversy could not repeat. The Court held that the issue is broader than any particular plan; rather, the issue is the likelihood of the larger controversy continuing under future plans due to the continuing drought conditions.

ESA 60-Day Notice

Reclamation next argued that the Tribes' notice was inadequate under the ESA's 60-day notice requirement. Reclamation asserted that the warning letter the Tribes sent Reclamation, stating that there would not be enough water and referencing the extensive history of litigation, was procedurally and substantively inadequate to satisfy the notice requirement. The Court held that this letter constituted sufficient notice both procedurally and substantively.

ESA Sections 7 & 9

Reclamation next argued that the TOP did not violate Section 7 because it was reasonable under the ITS as a "corrective action." The Court held that even though the Lake could not meet the levels required under the BiOp, that did not absolve Reclamation of its duty to minimize harm to the endangered suckerfish.
Reclamation also argued that it did not violate Section 9 because the Tribes failed to show any actual harm. The Court held that the science of the BiOps regarding how the suckerfish would fare with the lower Lake levels necessarily compelled the conclusion that a take had occurred.

***Tribes v. United States,* No. 1:22-CV-00680-CL, 2023 WL 7182281 (D. Or. Sept. 11, 2023), *report and recommendation adopted sub nom. Klamath Tribes v. United States Bureau of Reclamation,* No. 1:22-CV-00680-CL, 2024 WL 472047 (D. Or. Feb. 7, 2024)**; *summarized by Greg Allen*, Saalfeld Griggs, PC.

NEPA

Lastly, Reclamation argued that it took the requisite "hard look" under NEPA. The Court held that Reclamation did not adequately analyze the cumulative effects of three years of unprecedented drought on the Lake and the suckerfish, and that Reclamation should have conducted further NEPA analysis and could not rely on its vague and conclusory Determination of NEPA Adequacy ("DNA").

Remedy

The Court awarded the Tribes summary judgment on all of its claims and adopted the F&R in full: (1) a declaration that Reclamation violated the ESA by unlawfully taking endangered suckerfish, adversely modifying their critical habitat, and jeopardizing their continued existence by improper allocation of water for irrigation purposes under the TOP; and (2) a declaration that the Reclamation's DNA was inadequate under NEPA by failing to address the cumulative impact of three years of drought on Lake levels.