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Recent Environmental Cases and Rules

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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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OREGON SUPREME COURT

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

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***Umatilla County v. Department of Energy*, 372 Or 194 (2024) (*In the Matter of the Application for Site Certificate for the Nolin Hills Wind Power Project*)**; *summarized by* Rebekah Dohrman, Dorhman Land Law, LLC.

Background

Umatilla County sought judicial review of a final order of the Energy Facility Siting Council ("EFSC") granting a site certificate to allow Nolin Hills Wind, LLC (the "Applicant"), to construct a wind energy facility (the "Facility") in the County. EFSC's role in granting site certificates is set out in ORS chapter 469. (This decision provides a great primer for anyone looking to get up to speed in this area.) Initially, in the Applicant's notice of intent to file an application for a site certificate, the Applicant proposed that the Facility would be located within one county and only within exclusive farm use ("EFU")-zoned land. The Department of Energy ("DOE") asked the County to provide recommended applicable substantive criteria, a set of local rules and regulations to be considered by EFSC in evaluation of an application. The County timely provided the applicable substantive criteria, which included a two-mile setback between any wind turbine and a rural residence on EFU land. Eventually, the plans for the Facility changed. Instead of being in only EFU-zoned land, the Facility (and the associated transmission line route) would be located in four different land use zones. The County reviewed the site certificate application and noted that it did not comply with the County's setback requirements. Nevertheless, DOE recommended that EFSC approve the proposal because the County's setback requirement was not an "applicable substantive criterion." The County objected, but EFSC issued its final order consistent with DOE's recommendation.

Procedural History

The County sought judicial review of EFSC's final order issuing a site certificate for the Facility on the grounds that EFSC should have required compliance with the County's setback criterion. The Court reviewed EFSC's final orders for errors of law, abuses of agency discretion, and lack of substantial evidence in the record to support challenged findings of fact. ORS 469.403(6) (stating that the Court's standard of review of EFSC's final orders is the same as the Court of Appeals' standard of review provided in ORS 183.482).

Decision

The question before the Court was whether the County's setback criterion is an "applicable substantive criterion" that EFSC was bound to apply.

In addition to other alternative bases for its decision, EFSC stated that it had evaluated the proposed facility under ORS 469.504(1)(b)(B). As interpreted by EFSC, that statute allowed EFSC to approve a proposed facility that does not comply with the County's criteria but that does comply with applicable statewide planning goals. EFSC's final order listed the applicable statewide planning goals

that it believed applied and ultimately determined that the Facility complied with those statewide planning goals.

The County argued that EFSC's interpretation of the statute disregards the three "tracks" described in ORS 469.504(5) that provide different treatment for proposed facilities that pass through more than three land use zones. Track 1, the second sentence in subsection (5) of the statute, applies if the County does not timely recommend applicable substantive criteria. In this case, because the County provided the applicable criteria timely, track 1 does not apply. Track 2, the third sentence in subsection (5), applies to proposed facilities that do not pass through more than one jurisdiction or more than three land use zones. In track 2, EFSC shall apply the County's applicable substantive criteria. Track 3, the fourth sentence in subsection (5), applies to proposed facilities that do pass through more than one jurisdiction or more than three land use zones in any one jurisdiction. In track 3, EFSC must review the County's applicable substantive criteria and decide whether to evaluate the proposed facility against the County's criteria, the statewide planning goals, or a combination of the two.

ORS 469.504(1)(b)(B) expressly authorizes EFSC to issue a site certificate for a proposed facility even if the proposed facility does not comply with all applicable substantive criteria so long as the proposal otherwise complies with the applicable statewide planning goals. The Court first concluded that ORS 469.504(1)(b)(B) expressly authorized EFSC to issue a site certificate for a proposed facility even if the proposed facility does not comply with all applicable substantive criteria, so long as the proposal otherwise complies with the applicable statewide planning goals. The Court reviewed the legislative history of the statutes in question. Reviewing the legislative history of ORS 469.503 and ORS 469.504, the Court found that the legislature contemplated a situation where a proposed facility may comply with applicable statewide planning goals but not all applicable local criteria. In those situations, the legislature authorized EFSC to approve proposed facilities and determine what criteria to apply: the local approval criteria, the statewide planning goals, or a combination of both. That is reflected in track 3. ORS 469.504(5). The Court determined that the legislature did not impose the requirement that all proposed energy facilities comply with all local criteria as a prerequisite for a site certificate. The Court concluded that compliance with local land use regulations is one way for a facility to demonstrate compliance but is not the only way. Here, EFSC was authorized to apply the statewide planning goals themselves (as opposed to the County's criterion), and compliance with those applicable goals was sufficient.

The Court affirmed EFSC's final order, finding that the legislature authorized EFSC to approve proposed facilities without applying and finding compliance with the local governing body's criteria.

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***Cascadia Wildlands v. Bureau of Land Management*, No. 6:23-CV-1358-MC, 2024 WL 3292966 (D. Or. June 28, 2024)**; *summarized by* Andrew Missel, Advocates for the West.

Summary

This case involves a challenge to the U.S. Bureau of Land Management's ("BLM") Big Weekly Elk Forest Management Project ("BWE Project"), a timber project on BLM-managed land in western Oregon. In 2023, Plaintiffs, Cascadia Wildlands and Oregon Wild (collectively, "Cascadia Wildlands") filed suit in the District of Oregon, claiming that BLM violated the National Environmental Policy Act ("NEPA") and the Federal Land Policy Management Act ("FLPMA") by approving the BWE Project and conducting several timber sales as part of the project. On June 28, 2024, the Court granted BLM's motion for summary judgment and denied Cascadia Wildlands' cross-motion for summary judgment, finding that BLM had complied with both NEPA and FLPMA.

Background

In 2016, BLM adopted the Northwestern Coastal Oregon Resource Management Plan ("2016 RMP"), which "provides management direction for approximately 1.3 million acres of BLM lands in" western Oregon. *Cascadia Wildlands* at *1. In connection with the adoption of the 2016 RMP, BLM prepared an environmental impact statement ("EIS") under NEPA. The 2016 RMP contains several management prescriptions related to the marbled murrelet, a seabird listed under the Endangered Species Act. Among the prescriptions in the 2016 RMP is a requirement that BLM take certain steps "[b]efore modifying [marbled murrelet] nesting habitat or removing nesting structure." *Id.* at *3.

In 2021, BLM decided to move forward with the BWE Project, which entails conducting several timber sales on land in western Oregon covered by the 2016 RMP. BLM prepared an environmental assessment ("EA") in connection with its decision and tiered its analysis in the EA to the EIS prepared for the 2016 RMP. BLM then began implementing the BWE Project by conducting several timber sales.

In 2023, Cascadia Wildlands filed suit against BLM in the District of Oregon. Cascadia Wildlands alleged that BLM had violated FLPMA and NEPA in approving the BWE Project and conducting timber sales as part of the project. Specifically, Cascadia Wildlands claimed that (1) BLM violated FLPMA by "failing to conform the BWE Project to the 2016 RMP"; (2) BLM violated NEPA by failing to prepare a full EIS for the BWE Project; and (3) BLM violated NEPA by failing to take a "hard look" at the effects of the BWE Project in the EA. *Id.* at *3.

***Cascadia Wildlands v. Bureau of Land Management*, No. 6:23-CV-1358-MC, 2024 WL 3292966 (D. Or. June 28, 2024)**; *summarized by* Andrew Missel, Advocates for the West.

FLPMA Claim

In its summary judgment order, the Court first addressed the FLPMA claim. As the Court saw it, "Plaintiffs' FLPMA claim turn[ed] largely on BLM's interpretation of what actions constitute 'modifying nesting habitat' under the 2016 RMP." *Id.* at *4. Plaintiffs argued that "modifying nesting habitat" includes "indirect edge effects from [adjacent] activities," while BLM, in approving the BWE Project, interpreted the phrase to include "only direct effects." *Id.*

The Court concluded that BLM's interpretation is "a reasonable interpretation" of an ambiguous phrase, and thus entitled to so-called "*Auer* deference." *Id.* at *4–*6 (citing *Kisor v. Wilkie*, 139 S.Ct. 2400, 2415–16 (2019)). In reaching this conclusion, the Court relied largely on the fact that the 2016 RMP allows for certain activities that have short-term impacts on murrelets but which ultimately provide long-term benefits. In the Court's view, it would "make[ ] little sense to require strict . . . buffers for potential impacts from indirect edge effects from treatments in adjacent stands while encouraging—with the long-term goal of increasing nesting habitat via habitat restoration treatments—direct impacts from treatments within the occupied stand itself." *Id.* at *6. The Court acknowledged that the U.S. Fish and Wildlife Service ("FWS") had at one time disagreed with BLM's interpretation but found that to be of minimal relevance in light of FWS's lack of authority to administer or interpret the 2016 RMP.

Because the Court deferred to BLM's interpretation of "modifying nesting habitat," it concluded that the BWE Project is consistent with the 2016 RMP and that BLM did not violate FLPMA. According to the Court, "[b]ecause the BWE Project does not involve any actions 'modifying nesting habitat or removing nesting structure,'" the murrelet-specific protections of the 2016 RMP do not apply to the project. *Id.* at *6.

NEPA Claims

The Court next addressed Cascadia Wildlands' two NEPA claims. The Court first rejected the claim that BLM should have prepared a full EIS for the BWE Project. In reaching this conclusion, the Court relied mostly on FWS's biological opinion ("BiOp") for the BWE Project rather than BLM's EA and associated finding of no significant impact. The Court cited the BiOp's conclusions that the project is unlikely to cause negative impacts to marbled murrelet and murrelet habitat at a large scale and that any such impacts were considered in the 2016 RMP and associated EIS. The Court also relied on BLM's determination that the BWE Project complies with the 2016 RMP. Ultimately, the Court concluded that, even though the BWE Project may adversely affect marbled murrelet (and northern spotted owl) habitat, the record before BLM did "not require[] a finding of significance" so as to trigger a full EIS. *Id.* at *7-8.

Finally, the Court rejected Cascadia Wildlands' claim that BLM failed to take a "hard look" at the effects of the BWE Project in its EA. The Court concluded that BLM did enough in the EA to consider indirect edge impacts and impacts to the marbled murrelet more broadly, largely by tiering to analysis in the 2016 RMP and associated EIS. The Court concluded that the EA contained an adequate analysis of cumulative impacts flowing from the BWE Project and other nearby logging projects.

Subsequent Developments

On the same day that the Court issued its summary judgment order in this case, the Supreme Court released its opinion in *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (2024). In *Loper Bright*, the Supreme Court put an end to the doctrine of *Chevron* deference, which had compelled courts to defer to reasonable agency interpretations of ambiguous statutory provisions. *Id.* at 2273. Although *Loper Bright* involved *Chevron* deference rather than the form of deference applied by the court in this case (*Auer* deference), the logic of *Loper Bright* calls into question the continuing validity of *any* form of binding deference to agency legal interpretations. *See, e.g.*, Thomas E. Nielsen & Krista A. Stapleford, *What* Loper Bright *Might Portend for* Auer *Deference*, Harv. L. Rev. Blog (July 5, 2024), https://harvardlawreview.org/blog/2024/07/what-loper-bright-might-portend-for-auer-deference/ (opining that *Auer* deference may well survive *Loper Bright*, but acknowledging that "[t]he same arguments the *Loper Bright* majority advanced for overruling *Chevron* appear to apply just as readily to *Auer*"). Thus, the Court's decision to defer to BLM's interpretation of "modifying nesting habitat" is potentially on shaky ground.

On July 24, 2024, Cascadia Wildlands filed a notice of appeal. On appeal, Cascadia Wildlands is pursuing its FLPMA claim and its "hard look" NEPA claim, but is not pressing the claim that BLM should have prepared a full EIS for the BWE Project.

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***Cloud Foundation v. Haaland*, No. 2:23-CV-01154-HL, 2024 WL 3010998 (D. Or. June 14, 2024)**; *summarized by* Aidan Freeman, Marten Law LLP.

Background

The Wild Free-Roaming Horses and Burros Act ("WHA") grants the Bureau of Land Management ("BLM") jurisdiction over wild horses on federal lands. 16 U.S.C. §§ 1331–1340. It requires BLM to remove excess animals from a range if it finds that an "overpopulation exists" and that "action is necessary" to remove the animals. *Id.* § 1333(b)(2). BLM's primary method of controlling wild horse populations is by conducting "gathers" wherein the Bureau uses helicopters to herd the horses toward a temporary corral (i.e., a "trap") before preparing them for adoption or holding them in a long-term facility. BLM permits public observation of these gathers, but such observation is restricted, often to specific viewing areas some distance from the trap.

Procedural History

In this case, Plaintiffs—an animal welfare protection organization, its documentarian founder, and its director—submitted public comment on a May 2022 draft environmental assessment ("EA") for BLM's 10-year plan to manage wild horse populations in two Herd Management Areas ("HMAs") in Southeastern Oregon. The comment made extensive recommendations for BLM to attach real-time cameras to the helicopters, trap sites, and holding pens to permit enhanced public observation of gather activities. BLM made no substantive changes to its final EA and did not substantively respond to Plaintiffs' comment in its Finding of No Significant Impact or Record of Decision. *See* DOI-BLM-ORWA-V000-2021-0023-EA. In response, in August 2023, Plaintiffs brought First Amendment press freedom, National Environmental Policy Act ("NEPA"), and Administrative Procedure Act ("APA") challenges to BLM's plan. In November 2023, Defendants answered with a partial motion to dismiss, seeking to throw out Plaintiffs' NEPA claim. Defendants' twin theories for dismissal were that Plaintiffs (1) lacked standing and (2) failed to allege a NEPA claim because their complaint asserted only First Amendment violations, and thus did not allege an injury redressable under NEPA.

Standing

Defendants argued the complaint alleged only a First Amendment right of access violation as the "ultimate basis" of the NEPA claim, and thus failed to show the kind of concrete injury that a NEPA claim can prevent—i.e., environmental damage or impairment of aesthetic and recreational values of the area to be affected by the federal action.

Defendants argued Article III standing was lacking because the NEPA claim was premised on procedural standing, and thus the "procedures in question" must be

"designed to protect some threatened *concrete interest*" that is the "*ultimate basis*" of standing. (quoting *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 937 (9th Cir. 2005)). Defendants argued that even though Plaintiffs alleged they had an aesthetic and recreational interest in the HMAs subject to BLM's 10-year plan, they did not allege this interest could be damaged by the conduct challenged under NEPA. Defendants argued Plaintiffs' First Amendment right is not redressable by any relief the Court might grant under NEPA, because the alleged harm is not environmental.

Further, Defendants argued that even if Plaintiffs had constitutional standing, they lacked prudential standing because their asserted freedom of access interests were not within the zone of interests protected by NEPA.

The Court disagreed, siding with Plaintiffs that their NEPA claim is based on environmental interests distinct from those pled in their First Amendment claim. Because Plaintiffs' NEPA claim was based on the alleged injury that BLM refused to include a NEPA analysis of the use of real-time cameras during horse gathers, and Plaintiffs alleged the use of cameras would ensure more humane treatment of wild horses during gather operations, they alleged potential environmental harm that proper NEPA procedures could have protected. Thus, Plaintiffs' allegation that BLM failed to consider that alternative in the NEPA process supported procedural standing. The Court also held that Plaintiffs satisfied the zone of interest requirement under NEPA because they alleged the use of real-time cameras would ensure humane treatment of horses, even if their "primary concern is an impairment of their First Amendment rights." 2024 WL 1991552 at *9.

Failure to State a Claim

Defendants argued Plaintiffs had not properly alleged a NEPA claim because BLM had no duty under NEPA to consider the Plaintiffs' First Amendment right of access to observe gather operations, since this right is unrelated to impacts to the "physical environment." Defendants further argued Plaintiffs' proposed alternative for the federal action (installing cameras) was insufficiently related to the purpose of that action: managing the population of wild horses on public lands under the WHA. The Court again disagreed with Defendants, holding that insofar as Defendants challenged the relationship of the proposed alternative to the purpose of the project, this was a challenge to the merits of Plaintiffs' argument and thus inappropriate at the motion to dismiss stage. The Court held that Plaintiffs had sufficiently alleged that real-time cameras would decrease the risk of inhumane treatment of wild horses—a potential impact to the environment that is within the scope of required analysis under NEPA.

***Cloud Foundation v. Haaland*, No. 2:23-CV-01154-HL, 2024 WL 3010998 (D. Or. June 14, 2024)**; *summarized by* Aidan Freeman, Marten Law LLP.

Underlying First Amendment Issue

Though the motion before the Court did not concern Plaintiffs' First Amendment allegations, the Defendant's focus on these concerns warrants some discussion of the constitutional question at play in this litigation.

In 2012, the Ninth Circuit reversed the U.S. District Court for the District of Nevada's denial of a preliminary injunction that a wild horse photojournalist plaintiff had sought to force BLM to scale back viewing restrictions at horse gathers. *Leigh v. Salazar*, 677 F.3d 892, 901 (9th Cir. 2012). The Ninth Circuit ordered the district court on remand to analyze the photojournalist's motion under the two-part test for First Amendment right of access claims articulated by the Supreme Court in *Press Enterprise Company v. Superior Ct. of Cal. for Riverside Cty.* [*Press-Enterprise II*], 478 U.S. 1 (1986), a case involving attempts to access criminal trials, holding this test applies equally to questions concerning the right to access other government activities, such as horse gathers. *Id.* at 898–901. The *Press-Enterprise II* test requires a court to determine whether a right of access attaches to a government activity by considering (1) whether the place has been historically open to the press and public, and (2) whether public access "plays a significant positive role" in the functioning of the process in question. *Id.* at 898 (quoting *Press-Enterprise II*). If a qualified right does apply, the government must demonstrate an "overriding interest" necessitating the access restrictions, which must be "narrowly tailored" to serve that interest. *Id.*

On remand, the District of Nevada held the public has a First Amendment right of access to wild horse gathers on public lands. *Leigh v. Salazar*, 954 F.Supp.2d 1090, 1101 (D. Nev. 2013). However, the district court held that BLM's "overriding interests" in the safe, efficient, and effective gather of horses made the viewing restrictions placed on the plaintiff "reasonable" and not a First Amendment violation. *Id.* at 1104.

In this case, Plaintiffs allege the public observation restrictions BLM has put in place, and BLM's failure to place cameras to allow safe public viewing of horse gathers, are "not narrowly tailored to serve an overriding government interest." As the litigation progresses, Plaintiffs will likely seek to distinguish their claims and the underlying facts from those at issue in *Leigh*.

Remedy and Subsequent History

The Court, via magistrate, made a findings and recommendation ("F&R") that BLM's partial motion to dismiss be denied. The District Court adopted the F&R in full two months later over Defendants' objections.

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***County of Multnomah v. Exxon Mobil Corp.*, No. 3:23-CV-01213-YY, 2024 WL 2938473 (D. Or. June 10, 2024)**; *summarized by* Sarah Miranda, Lewis Brisbois.

Background

This case arises from actions filed by many municipalities and local governments against big-name polluters in the fossil fuel industry. In 2017, many government bodies filed lawsuits against Exxon Mobil Corp., Chevron Corp., and other fossil fuel-related companies, alleging state law claims for public nuisance, negligence, trespass, and fraud. Multnomah County is a plaintiff in one of those lawsuits, alleging that the defendant fossil fuel companies failed to warn the public about the dangers of their products, creating injuries related to public health and infrastructure from global climate change. Defendants, in turn, tried to remand the cases to federal court. Most of these cases returned back to state courts because they lacked federal jurisdictional issues appropriate for federal court.

In the case at issue, the defendant fossil fuel companies argued that they were all citizens of states other than Oregon, except for the Oregon-based company, Space Age Fuel, Inc. (herein "Space Age"). Defendants removed the case to federal court, asserting diversity jurisdiction because Space Age was a sham defendant joined solely to avoid federal court. Defendants also argued that, in the alternative, Space Age was procedurally misjoined under Federal Rule of Civil Procedure 20. The Court granted Plaintiff's motion to remand because Defendants did not meet the burden of showing that there was no possibility that the Plaintiff could state a valid claim against Space Age. Further, because Space Age was adequately joined, federal court did not have diversity jurisdiction to decide the issue of procedural misjoinder.

Motions to Remand

Federal courts have limited jurisdiction, including jurisdiction when there is complete diversity of the parties (diversity jurisdiction) or when the case presents a question rooted in federal law (federal question jurisdiction). The general removal statute for defendants to remove a case from state court to federal court is 28 USC § 1441. The party asserting removal has the burden of proving the case is removable, which is a high standard.

Defendants argued that the case was removable because (1) it raised a federal issue under *Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg*., 545 U.S. 308 (2005); (2) it involves a federal officer as defined under 28 USC §1442(a); and (3) it involves claims necessarily and exclusively governed by federal common law.

When addressing the Defendants' arguments of federal issue under *Grable* and federal officer, the Court relied on the Ninth Circuit's opinion in City *of Oakland v. BP PLC*, No. 22-16810, 2023 WL 8179286 (9th Cir. Nov. 27, 2023) and barred removal of the case under the *Grable* doctrine and the federal officer removal statute. In *City of Oakland*, the municipalities sued energy companies alleged that

the production and use of fossil fuels created a public nuisance under California Law. *Id*. at *4. The energy company defendants in turn removed the case to federal court because at the time, they were acting under federal direction during World War II and under ongoing specialized fuel contracts. *Id*. at *8. The energy companies also argued that removal was proper under the *Grable* exception, which allows removal if a federal question is "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Oakland*, 969 F.3d at 906-07 (quoting *Gunn v. Minton*, 568 U.S. 251, 258 (2013)). The Ninth Circuit rejected both defendant energy companies' grounds for removal because, as to the World War II claims, this evidence merely confirmed the energy companies' compliance with the law while executing arms-length business agreements to supply fuel and build fuel infrastructure. *Id*. at *9. Additionally, arm's length business arrangements, like the specialized fuel contracts, do not support the assertion that the energy companies were "acting under" federal officers. *Id*. Therefore, the defendants' grounds for removal were not rooted in federal interests and should be remanded back to state court. *Id*. at *10.

Diversity Jurisdiction

The Defendants in the present case argued that the Court should ignore Space Age's Oregon citizenship for diversity jurisdiction purposes because of fraudulent joinder and procedural misjoinder. Diversity jurisdiction requires complete diversity, meaning the plaintiff must be a citizen of a different state than each defendant. Under *Chesapeake & Ohio Ry. Co. v. Cockrell*, 232 U.S. 146 (1914), district courts may disregard the citizenship of a non-diverse defendant who was fraudulently joined, including the inability of plaintiff to establish a cause of action against the non-diverse party in state court. Fraudulent joinder can be proven if a defendant shows that the individual cannot be liable to plaintiff *on any theory*. This rule is strictly construed because of a general presumption against finding fraudulent joinder.

In arguing fraudulent joinder, Defendants claimed that Plaintiff did not allege and cannot prove that Space Age made misrepresentations related to fossil fuels to prove they engaged in a "scheme" to "deceptively promote" fossil fuels. The Court found that Plaintiff's claims for public nuisance, negligence, and trespass under state law did not require Plaintiff to plead a misrepresentation and properly state each claim. Alternatively, Plaintiff did allege specific allegations against Space Age, including the statement that from "2010 through 2021, Space Age Fuel contributed 7,601,219 metric tons of CO2 greenhouse gas emissions in Oregon," among other specific allegations. *Cnty. of Multnomah* at *4. The Court found that the factual allegations were sufficient to establish the possibility that a state court could find a valid claim against Space Age, thus defendants did not satisfy the heavy burden of showing that there is no possibility that Plaintiff could prevail

against claims directed at Space Age. As for Defendants' other issues related to collective allegations against Defendants and state licensing issues, the Court found that these issues related to the underlying merits of Plaintiff's claims or Defendants' defenses, and not the fraudulent joinder issue.

Procedural Misjoinder

Procedural misjoinder is based on an application of Federal Rule of Civil Procedure 20, which requires that claims "must 'aris[e] out of the same transaction' or 'occurrence' to be properly joined." Fed. R. Civ. P. 20(a)(2)(A)). Defendants argued that Plaintiff's claims against Space Age did not "arise out of the same transaction or occurrence" as the claims against other defendants because Space Age has never made any statement of communication about climate change nor was Space Age a member of any of the industry associations. The Court noted that the Ninth Circuit has not used procedural misjoinder to evaluate whether a party does not have diversity jurisdiction, and the caselaw surrounding this issue weighs against Defendants.

If the Court were to apply a Federal Rule of Civil Procedure, then it would be assumed that the Court had subject matter jurisdiction over the present action, which was not found in this case. Additionally, removal under §1441 is "strictly construed," favoring remanding cases to state courts. The Court remanded the case to state court to allow the state court to decide the misjoinder issue.

Conclusion

The Court found that attorney's fees to Plaintiff were not appropriate here because the case involved issues that do not present in previous Ninth Circuit cases and only one other case outside of the circuit. Additionally, the arguments were not objectively unreasonable or frivolous. The Court recommended that Plaintiff's Motion to Remand be granted, and the case should go back to Multnomah County Circuit Court.

United States Magistrate Judge Youlee Yim You issued her Findings and Recommendations in this case to District Judge Adrienne Nelson, who adopted the Findings and Recommendations and granted Plaintiff's Motion to remand to State Court in June of 2024.

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