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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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No. 3:22-CV-00790-HZ, 2024 WL 3640150 (D. Or. Aug. 1, 2024)

Introduction

Petitioners, Fort Klamath Critical Habitat Landowners, Inc., *et al.,* petitioned for judicial review of an order of the Oregon Water Resources Department ("OWRD") in other than a contested case under ORS 183.484. The order approved the Thomas Family Limited Partnership's ("Intervenor's") request for a temporary transfer of water rights under ORS 540.523.

ORS 540.523 establishes an expedited process for a temporary transfer of a point of diversion and place of use of water. A temporary transfer may be allowed for a period of time not to exceed five years. A request for a temporary transfer must be submitted to OWRD in writing and include the appropriate fee along with other required information. ORS 540.520(2). ORS 540.523(2) provides, "…[OWRD] shall approve by order a request for a temporary transfer under this section if [OWRD] determines that the temporary transfer will not injure any existing water right."

Background

In 2014, Intervenor's water rights were determined to be a "Klamath Termination Act claim" within the Upper Klamath Basin, which authorized Intervenor to divert water from points of diversion and to use that water for "irrigation *** with incidental livestock watering," at a "place of use" on Intervenor's ranch in the Upper Klamath Basin. *Fort Klamath Critical Habitat Landowners, Inc. v. Woodcock*, 334 Or. App. at 525.

The focus of the OWRD order is Intervenor's application to temporarily transfer its water rights (described below) to a new point of diversion some 44 miles to the south, in Oregon, on the Klamath River. The purpose of the temporary transfer was to irrigate wetland plants in a portion of the Lower Klamath National Wildlife Refuge to help maintain habitat for fish and wildlife. The refuge is within the hydrological drainage area of the Upper Klamath Basin, partly in Oregon but mostly in California.

Petitioners also have in-stream irrigation water rights to the same points of diversion, upstream from Intervenor's water rights. Petitioners' water rights have priority dates that are either the same as or junior to Intervenor's water rights.

Procedural History

In circuit court, Petitioners filed a motion for partial summary judgment, asserting that the transfer application was seeking an "out-of-basin" transfer, and that the OWRD had not considered all the criteria that apply in that context. Intervenor and the OWRD filed a motion for summary judgment on all of Petitioners' claims. The circuit court denied Petitioners' motion for partial summary judgment and granted

Intervenor's and the OWRD's motions, dismissing Petitioners' claims and upholding the OWRD's order.

The Court reviews the circuit court's rulings on cross-motion for summary judgment for errors of law, determining whether the summary judgment record shows that there are no genuine issues of material fact and that either party is entitled to judgment as a matter of law. *Windmill Inns of America, Inc. v. Cauvin,* 299 Or App 567, *rev den*, 366 Or 257 (2020).

Decision

After denying Petitioners' five assignments of error, as provided below, the Court affirmed the circuit court's decision affirming the OWRD's decision approving Intervenor's temporary transfer of water rights.

1. *Out-of-basin transfer*

Petitioners first assert that the temporary transfer, which will transfer water outside of the State of Oregon, is an out-of-basin transfer subject to out-of-basin transfer provisions set forth in ORS 537.801 to 537.809, provisions that OWRD's order failed to consider. The OWRD and Intervenor respond that temporary transfers of water rights, like Intervenor's request, are not subject to the out-of-basin transfer statutes and rejected Petitioners' argument.

After performing a statutory construction analysis, the Court concludes that the subject temporary transfer application is not a request for an out-of-basin transfer, finding that a basin can be geographically within the state and also extend hydrologically into another state. The Upper Klamath Basin, as applicable here, is a hydrological basin within both Oregon and California. The temporarily transferred point of diversion and the transferred place of use are both within that basin. The Court determined that the legislative history did not demonstrate an intention to make a transfer within a hydrological basin that results in the use of water in another state an out-of-basin transfer.

The Court limits its conclusion to the issue of whether the subject application was an out-of-basin transfer and did not consider the extent to which the out-of-basin transfer provisions might be applicable to temporary transfers of water rights that result in a transfer of diversion points or use of water outside of the hydrological basin.

2. *"Injury"*

Petitioners' second argument is that the approved temporary transfer will cause them "injury." ORS 540.523(2) provides that OWRD will approve temporary

transfer requests unless the temporary transfer will injure an existing water right. OAR 690-380-0100(3) provides the definition of "injury to an existing water right," in this context, as "a proposed transfer would result in another, existing water right not receiving previously available water to which it is legally entitled."

Petitioners explain that historically Intervenor has not used its full "paper rights" to water use and that under the temporary transfer, Intervenor would be using more water than it had historically been using. That increase in use, Petitioners argue, will result in injury to Petitioners. The circuit court addressed this argument and found that an increase in use of water by the holder of water rights within the limits of a valid water right does not constitute injury to another's water rights.

The Court agreed with the circuit court explaining that Petitioners' water rights are either junior or equal to Intervenor's water right in priority, and a transfer makes no change in priority. Thus, the Court concluded that Petitioners' alleged injury is simply a feature of the prior appropriation system and not an "injury" that is legally cognizable.

3. A change in the "character of use"

Petitioners' third assignment of error alleges that the temporary transfer results in a change in the "character of use" and such a change is only permitted under OAR 690-380-8000 when the water right is for the storage of water. The subject transfer is for irrigation and incidental livestock watering. The Court found that OWRD's final order stated that the authorized character of use at the transferred location would be "irrigation *** with incidental livestock watering." Petitioners assert that the kind of irrigation has changed from agriculture to wetland plants for fish and wildlife habitat. The Court denied Petitioners' third assignment of error where the plain terms of OWRD's order did not create a change in the "character of use" and the water right did not limit irrigation for agriculture. *Fort Klamath Critical Habitat Landowners, Inc. v. Woodcock,* 334 Or. App. at 525.

In reaching this conclusion, the Court reviewed OWRD's construction of its own rule, OAR 690-300-0010(26), and concluded that the rule construction was plausible and deference was owed to the agency. *See Don't Waste Oregon Com. V. Energy Facility Siting*, 320 Or 132, 142 (1994) (explaining that, under ORS 183.482(8)(a), a reviewing court will defer to an agency's interpretation of its own administrative rule if that interpretation is plausible); *Sky Lakes Medical Center v. Dept. of Human Services*, 310 Or App 138, 148 (2021).

4. Waste

Next, Petitioners argued that the approved temporary transfer would result in waste in the form of evaporation and seepage. The Court agreed with OWRD and Intervenor that the temporary transfer did not approve waste, it approved irrigation, a beneficial use of water. Further, the Court explained that the criteria for reviewing and approving a temporary transfer request do not include a question of waste.

5. No error where Petitioners failed to establish legally cognizable error

Petitioners' fifth assignment of error asserts that the circuit court erred in granting Intervenor's and OWRD's motions for summary judgment because several criteria were not supported by substantial evidence. The Court denied this assignment of error concluding that Petitioners had not established legally cognizable errors relating to injury, waste, nor a change in character of use.

***Northwest Environmental Advocates v. United States Environmental Protection Agency*, No. 3:21-CV-01136-HZ, 2024 WL 3888695 (D. Or. Aug. 20, 2024)**, *summarized by* Sarah Melton, American Forest Resource Council.

Introduction

On August 20, 2024, U.S. District Court Judge Marco Hernandez issued a mixed ruling in a challenge to the State of Oregon Department of Environmental Quality's ("DEQ") alleged ongoing failure to submit 2,467 total maximum daily loads ("TMDL") under the Clean Water Act ("CWA") for pollutants that could be discharged into a State body of water, rejecting the assertion that the Environmental Protection Agency ("EPA") must therefore step in and act. The Oregon DEQ intervened as a defendant in the case. *Nw. Env't Advocs. v. U.S. Env't Prot. Agency*, No. 3:21-CV-01136-HZ, 2024 WL 3888695 (D. Or. Aug. 20, 2024) ("*NWA*").

On August 3, 2021, Plaintiff Northwest Environmental Advocates filed suit against the EPA in Oregon District Court alleging four claims: (1) that the EPA failed to review and disapprove approximately 2,467 TMDLs that Oregon had constructively submitted, as the CWA required; (2) that EPA's approval of Oregon's 2020 TMDL priority ranking and prioritization schedule was arbitrary and capricious, in violation of the APA; (3) that the EPA failed to determine Oregon's schedule for submitting TMDLs, as the CWA required; and (4) in the alternative, that EPA's failure to develop a schedule for Oregon's TMDL submissions was either arbitrary and capricious or an unreasonable delay of agency action, in violation of the APA. *Id.* at *6.

Background

The 1972 CWA, 33 U.S.C. §§ 1251–1389, requires that certain effluent limitations are set and contemplates that states take a leading role in achieving the CWA's policies and goals, which include eliminating discharging pollutants into navigable waters. 33 U.S.C. §§ 1251(a)(6), (b), 1311(a). A TMDL is the "upper limit on the amount of a particular pollutant that can be discharged into a given body of water." *NWA*, 2024 WL 3888695, at *2 (citing *City of Arcadia v. U.S. Env't Prot. Agency*, 411 F.3d 1103, 1105 (9th Cir. 2005)). The CWA requires that states establish priority rankings for TMDLs and submit them to the EPA "from time to time." *Id.* at *9 (citing 33 U.S.C. §§ 1313(d)(1)(C), 1313(d)(2)).

In 2000, Plaintiff and the EPA entered into a settlement agreement that established a target for Oregon to develop 1,153 TMDLs by the end of 2010. Oregon made significant progress between 2000 and 2010, producing 1,206 TMDLs. In 2017, the court invalidated a number of Oregon's TMDLs that related to temperature because they did not comply with applicable standards and ordered the parties to develop a schedule for replacing those defective TMDLs. *Id.* at *3 (citing *Nw. Env't Advocs v. U.S. Env. Prot. Agency, et al.*, No. 3:12-cv-01751-AC, 2017 WL 1370713 (D. Or. Apr. 11, 2017). Replacement of these TMDLs is ongoing, others have been completed since, and, in October 2023, the court ordered completion of the remaining temperature TMDLs by May 2028. *Id.*

On August 3, 2021, Plaintiff sued the EPA. On April 4, 2022, the Court denied EPA's motion to dismiss Claims Two, Three, and Four. On July 15, 2022, Plaintiff moved for leave to take discovery on Claims One, Three, and Four, which the court granted in part holding that, with regards to those Claims, the administrative record was open because they alleged agency inaction and thus there was no final decision from the EPA. The court also held that the administrative record could be supplemented, but with adequate justification. Discovery ensued, and the court held oral arguments on August 2, 2024. *Id.* at *6.

The Court's Analysis

1. Evidentiary Issues

All parties raised evidentiary objections. Plaintiff objected to a May 2022 EPA memorandum ("memo") that summarized Oregon DEQ's TMDL program. Plaintiff argued that the memo was "a post-complaint, extra-record document that EPA employees prepared in direct response to this litigation," and thus should not have been part of the administrative record. *Id.* at *7. The Court found that because Plaintiff had successfully argued that the record was open on certain claims, the summary memo could be included. *Id.* at *8 (citing *San Francisco BayKeeper v. Whitman*, 297 F.3d 877, 886 (9th Cir. 2002)).

Defendants' objections related to most of the extra-record evidence Plaintiff included with its Motion for Summary Judgment, including declarations from Plaintiff's executive director that discussed the history of Oregon's TMDL program and from Plaintiff's legal counsel, both with multiple exhibits attached. The Court considered whether supplementation of the record was appropriate and whether the exhibits were admissible, finding that some were relevant to Plaintiff's claims, including standing and Plaintiff's interpretation of the evidence; some exhibits were not justified for inclusion; and some were sources of law that the Court could consider, regardless of whether any party submitted them. *Id.*

2. Claim One: Constructive Submission of TMDLs

The Court concluded that Defendants were entitled to summary judgment on Claim One, in which Plaintiff argued that Oregon's long delay in submitting TMDLs for certain categories meant that Oregon had constructively submitted no TMDLs in those categories. The Court held that Plaintiff's category-based constructive submission claim was both not viable as plead and that it failed on the merits. *Id.* at *9. The Plaintiff-identified categories were: (1) waters that the Oregon DEQ assigned as a low priority for TMDLs; (2) waters that were long overdue for TMDLs because they had been impaired for over a decade; (3) TMDLs for pollutants or parameters

that Plaintiff claimed DEQ routinely ignored; and (4) all impaired waters in the Willamette River Basin. *Id.* at *10.

The Court also found that Plaintiff's claim against the EPA was essentially a challenge to Oregon's priorities, stating that recognizing such a claim would "effectively" allow Plaintiff to "dictate a state's TMDL development priorities through litigation," and holding that the "'constructive submission doctrine [did] not prevent a state from prioritizing the development and issuance of a particular TMDL.'" *Id.* at *12 (quoting *Columbia Riverkeeper v. Wheeler*, 944 F.3d 1204, 1209 (9th Cir. 2019)). It further explained that to trigger the EPA's nondiscretionary duty to act under the CWA and issue its own TMDLs, Plaintiff needed to demonstrate that Oregon "'clearly and unambiguously decide[d] not to submit any TMDLs,'" which Plaintiff did not do. *Id.* at *11 (quoting *Hayes v. Whitman*, 264 F.3d 1017, 1024 (10th Cir. 2001)).

3. Claim Two: Oregon's 2020 TMDL Priority Ranking

The Court concluded that Plaintiff was entitled to summary judgment on Claim Two, which alleged that EPA's approval of Oregon's 2020 TMDL priority ranking was arbitrary and capricious under the APA because the record did not show that EPA was reasonable in concluding that the Oregon DEQ had considered the required factors under the CWA in formulating its priority rankings. *Id.* at *22. Though the EPA argued Plaintiff's claim was moot because the agency had already approved Oregon's 2022 priority rankings and the 2020 ranking no longer had any legal effect, the Court found the "capable of repetition yet evading review" exception applied. *Id.* at *20. The Court concluded that requiring the EPA to review Oregon's 2020 rankings—which the 2022 rankings superseded and which in turn would be superseded by Oregon's 2024 rankings—would result in an "inefficient use of agency resources to no benefit"; therefore, declaratory judgment on Claim Two would provide sufficient remedy through future guidance for the agencies, rather than vacatur and remand back to the agency. *Id.* at *22.

4. Claim Three: Failure to Set TMDL Schedule Under the CWA

The Court concluded that Plaintiff and Defendants were each entitled to partial summary judgment on Claim Three. The Court noted that Oregon had submitted rankings and a partial schedule of estimated completion dates for higher-priority TMDLs, but had only stated its intent to prioritize lower-priority TMDLs as the higher ones were completed. The issue for the Court to determine, therefore, was whether the CWA requires the EPA and Oregon DEQ to develop a schedule for TMDLs that Oregon has designated as lower-priority. *Id.* at *23.

Citing *Kisor v. Wilkie*, 588 U.S. 558 (2019), the EPA argued that its interpretation of the CWA was reasonable and entitled to deference, and the CWA did not require a

complete schedule. *Id.* at *23. Plaintiff countered that the CWA must be interpreted to require a complete schedule to give full effect to the CWA's goals. *Id.* The Court engaged in a lengthy examination of the relevant provisions of the CWA and concluded that the CWA does not require the submission of a full schedule with estimated completion dates for all TMDLs. It also concluded it did not need to determine whether *Kisor* applied because the regulation was not ambiguous, and minimal collaboration between the EPA and Oregon would be sufficient to jointly determine the schedule. *Id.* at *28. Finding in partial favor of Plaintiff, the Court held EPA failed to approve or disapprove Oregon's 2020 schedule for submission of TMDLs that were targeted for development over the next two years because the agency had "expressly disavowed" taking any action to approve or disapprove Oregon's 2020 schedule. *Id.* As with Claim Two, the Court concluded that declaratory judgment was the appropriate relief. *Id.*

5. Claim Four: Failure to Set TMDL Schedule Under the APA

The Court concluded that Defendants were entitled to summary judgment on Claim Four explaining that, because the CWA was the only basis for a duty for the EPA to act and Plaintiff's claim was actionable under the CWA's citizen suit provision. Plaintiff could thus not obtain relief under the APA: "The APA does not provide a cause of action if the CWA provides a cause of action." *Id.* at *29 (citing *Oregon Nat. Res. Council v. U.S. Forest Serv.*, 834 F.2d 842, 851 (9th Cir. 1987)).

The CWA's citizen-suit provision allows any citizen to sue the Administrator for their alleged failure to "perform any act or duty" that "is not discretionary with the Administrator." *Id.* at *3 (citing 33 U.S.C. § 1365(a)(2)). The Court held that the CWA imposed a nondiscretionary duty on EPA to act and therefore Plaintiff could bring suit under the CWA's citizen suit provision. *Id.* at *23. Plaintiff plead Claim Four as an alternative to Claim Three, and argued its APA claim was still viable if the Court found the CWA required the EPA Regional Administrator and Oregon DEQ needed to adopt only a partial or short-term TMDL schedule. The Court disagreed, explaining that the action legally required was narrow and Plaintiff had identified no basis for that obligation outside of the CWA and its implementing regulations. *Id.* at *29.

Conclusion

The Court concluded that the appropriate relief was declaratory judgment, holding the EPA's approval of Oregon's 2020 priority rankings violated the APA because it was arbitrary and capricious, and the EPA and Oregon had jointly failed to determine Oregon's 2020 schedule for TMDL submissions. The Court declined to order the EPA to re-review the 2020 priority rankings or schedule, and concluded that declaratory judgement would provide future guidance to the agencies, "without requiring [them] to spend their time revising materials that will have no legal effect." *Id.* at *22.

***Oregon Nat. Desert Ass'n, Friends of Nevada Wilderness v. U.S. Department of the Air Force*, No. 2:24-CV-00145-HL, 2024 WL 3826134 (D. Or. Aug. 7, 2024), *report and recommendation adopted*, No. 2:24-CV-145-HL, 2024 WL 3925845 (D. Or. Aug. 23, 2024)**, *summarized by* Greg Allen, Saalfeld Griggs, PC.

Background

In March of 2023, the U.S. Department of the Air Force ("Air Force") conducted an Environmental Impact Statement ("EIS") to determine the impacts of flying military jets for training purposes lower to the ground than previously allowed in the Owyhee Canyonlands of Oregon, Nevada, and Idaho. In July of 2023, the Air Force released its Record of Decision ("ROD"), concluding that F-15 fighter jets could descend to 100 feet over the ground—as opposed to 3,000 feet as they had previously been allowed—and that supersonic jets could descend to 10,000 feet over the ground—as opposed to 30,000 feet as they had previously been allowed.

Plaintiffs the Oregon Natural Desert Association, the Friends of Nevada Wilderness, and the Idaho Conservation League, whose collective missions are generally to protect and preserve the wilderness in question, sued the Air Force under the National Environmental Policy Act and the Administrative Procedure Act. Plaintiffs alleged that the Air Force's EIS and ROD failed to take the requisite "hard look" at the decision's adverse impacts and mitigation measures in regards to how the intensified military flights will harass and displace sage grouse and big horn sheep, impact watersheds, and increase wildfires. The Air Force moved to dismiss the action under Rule 12(b)(1) for lack of standing.

Standing Standard

Before Magistrate Judge Hallman, the Court first set out the standard for standing, a jurisdictional threshold. The Court explained that a party seeking judicial authority must first demonstrate that they have a personal stake in the outcome. For environmental plaintiffs, it is not enough that the environment is harmed; rather, the plaintiffs themselves needs to show an aesthetic or recreational interest that will be harmed by the defendant's action, that is, the plaintiff has to use the affected area. An environmental organization can have associational standing where: (1) its individual members have standing; (2) it seeks to protect interests germane to its purpose; and (3) and the claim and relief requested do not require individual members to participate.

Discussion

The Air Force argued that Plaintiffs did not sufficiently allege standing under the first prong of the standard for associational standing: they did not specifically identify any individual members who would have standing in their own right. The Court rejected this argument because, for purposes of the present stage of litigation, Plaintiffs had made sufficiently clear allegations about its members' interests and their abilities to bring claims in their own right.

***Oregon Nat. Desert Ass'n, Friends of Nevada Wilderness v. U.S. Department of the Air Force*, No. 2:24-CV-00145-HL, 2024 WL 3826134 (D. Or. Aug. 7, 2024), *report and recommendation adopted*, No. 2:24-CV-145-HL, 2024 WL 3925845 (D. Or. Aug. 23, 2024)**, *summarized by* Greg Allen, Saalfeld Griggs, PC.

The Court held that, for purposes of a Rule 12(b)(1) motion to dismiss for lack of standing, an environmental organization is not required to specifically identify individual members who would have standing in their own right. Rather, an environmental organization only needs to allege with sufficient clarity that one or more members have an aesthetic or recreational interest in a particular place or animal or plant species that would be impaired by the defendant's conduct. The allegation just needs to show that the members' interest is "relatively clear" as opposed to being "merely speculative." The Court concluded that Plaintiffs had made the required allegation about its members' interests in the affected area to a sufficient degree of clarity.

Recommendation

Magistrate Judge Hallman recommended that the Air Force's motion to dismiss be denied, and the District Court, Judge Simon, adopted Judge Hallman's recommendation.

***Xerces Society for Invertebrate Conservation v. Shea*, No. 3:22-CV-00790-HZ, 2024 WL 3640150 (D. Or. Aug. 1, 2024)**, *summarized by* Hannah Goldblatt, Advocates for the West.

Background

Plaintiffs Xerces Society for Invertebrate Conservation and Center for Biological Diversity brought this case against Defendants Kevin Shea and the Animal and Plant Health Inspection Service ("APHIS"). This case involved challenges to APHIS's Rangeland Grasshopper and Mormon Cricket Suppression Program ("the Program"). Plaintiffs alleged that APHIS's 2019 Environmental Impact Statement ("EIS") and Record of Decision, as well as its state-level Environmental Assessments ("EA") and findings of no significant impact for Oregon, Idaho, Wyoming, and Montana, for the Program violated the National Environmental Policy Act ("NEPA") and the Administrative Procedure Act ("APA").[1]

The Plant Protection Act, 7 U.S.C. § 7717(a), gives APHIS authority to carry out the Program to control grasshopper and Mormon cricket populations to protect rangeland across 17 Western states. The statute requires APHIS to "immediately treat" lands infested with grasshoppers or Mormon crickets when their populations rise to levels of economic infestation. *Id.* at (c)(1). It also requires APHIS to "work in conjunction with other Federal, State, and private prevention, control, or suppression efforts to protect rangeland." *Id.* at (c)(2).

Plaintiffs Had Article III Standing

As an initial matter, the Court rejected Defendants' argument that Plaintiffs failed to establish the causation and redressability prongs of Article III standing.

The Court first found Plaintiffs established causation for their procedural claims "because there is a 'reasonable probability' that APHIS's actions threaten their interests." 2024 WL 3640150 at *4. Plaintiffs submitted declarations demonstrating their recreational, scientific, spiritual, and aesthetic interests in areas that have been or are likely to be subject to pesticide applications under APHIS's Program, thus potentially harming these interests. The Court rejected Defendants' arguments to the contrary, which primarily relied on *Washington Environmental Council v. Bellon*, 732 F.3d 1132 (9th Cir. 2013). Unlike that case—which alleged the State of Washington's failure to regulate certain greenhouse gas emissions contributed to injuries from climate change—this case involved a procedural right. Moreover, the record showed that pesticide treatments authorized by APHIS's program were the main source of pesticides in those areas and could affect insect populations that Plaintiffs had interests in.

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[1] Plaintiffs also alleged that APHIS violated the Endangered Species Act by failing to complete programmatic consultation under Section 7 of the Act. Because APHIS completed consultation before oral argument, Plaintiffs conceded the claim was moot.

Next, the Court found Plaintiffs adequately established redressability. If Plaintiffs succeeded on their NEPA claims, "it could influence the agency's ultimate action" such as by "the use of IPM [(Integrated Pest Management)] techniques and a reduction in the use of pesticides." 2024 WL 3640150 at *6. The Court rejected Defendants' contention that "without APHIS, other actors would implement pesticide programs that are entirely redundant in their effect on Plaintiffs' interests." *Id.* (cleaned up).

The 2019 EIS Violated NEPA

Turning to the alleged legal violations, the Court first addressed Plaintiffs' claim that the 2019 EIS violated NEPA. Plaintiffs alleged that the 2019 EIS was unreasonably narrow in its purpose and need statement, and range of alternatives; did not contain sufficient baseline information; and failed to take a hard look at mitigation and cumulative impacts. The Court agreed on all fronts, except Plaintiffs' mitigation argument.

1. *Purpose & Need Statement and Range of Alternatives*

First, the Court agreed that by focusing only on the reactive use of pesticides, the 2019 EIS's purpose and need statement was unreasonably narrow. Plaintiffs argued that two statutes required APHIS to include IPM techniques in the scope of the Program. For one, the Program's authorizing statute—the Plant Protection Act—requires APHIS in carrying out the Program's mandate to "work in conjunction with other Federal, State, and private prevention, control, or suppression efforts to protect rangelands." 7 U.S.C. § 7717(c)(2); *see also id.* § 7717(a). Two, the Food Quality and Protection Act of 1996 requires federal agencies to "use [IPM] techniques in carrying out pest management activities." 7 U.S.C. § 136r-1. Viewing these statutes together, the Court found that by focusing only on grasshopper suppression via the use of pesticides, "the EIS is narrower than the relevant statutes and the purpose and need statement is invalid." 2024 WL 3640150 at *8.

Given the 2019 EIS's unreasonably narrow purpose and need statement, the Court also found that the EIS's range of alternatives was unreasonable because APHIS only considered alternatives to those involving reactive pesticide use. "APHIS never consider[ed] IPM techniques as either a standalone alternative or in conjunction with other treatment." *Id.* at *9.

2. *Baseline Information*

Next, the Court addressed Plaintiffs' argument that the 2019 EIS lacked sufficient baseline information about past pesticide applications, and non-target sensitive species not listed under the Endangered Species Act, in violation of NEPA.

Regarding past pesticide applications, the Court found that "APHIS did not err in deferring this analysis until the site-specific EAs" since "[n]o critical decision has been made in the EIS." *Id.* at *10. It was sufficient for the EIS to discuss this information in general terms.

As to information about sensitive species, the Court first held that "the EIS contained an adequate discussion of the sage grouse." *Id.* at *11. As to other species, however—including butterflies, months and native bees—APHIS did "not provide any context for the current state of those insects in Western rangelands" and could not rely on stale data from 2002 and 2015. *Id.*

3. Hard Look: Mitigation & Cumulative Impacts

Finally, the Court considered Plaintiffs' arguments that the 2019 EIS lacked an adequate analysis of mitigation measures and cumulative effects.
For APHIS's analysis of mitigation measures, the Court disagreed with Plaintiffs' assertions. Plaintiffs' argument focused on only one mitigation measure, but did not address other mitigation measures listed in the EIS, including reduced agent area treatments, application buffers, avoidance, notification, and wind speed and direction. Given this, as well as the programmatic nature of the EIS, the Court rejected Plaintiffs' argument.

But for APHIS's cumulative effects analysis, the Court agreed that APHIS "arbitrarily focuse[d] on the lack of temporal overlap between pesticide applications and references other pesticide users in very general terms." *Id.* at *12. Under NEPA, APHIS's programmatic EIS was required to "at least address—in general term—the possible cumulative effect on the environment of insecticide use by other land managers in proximity to treatments under the Program." *Id.*

The State-Level EAs Violated NEPA

The Court then turned to Plaintiffs' allegations that the state-level EAs for Idaho, Oregon, Wyoming, and two regions of Montana, violated NEPA in three ways. The Court agreed.

1. Site-Specific Impacts

First, the Court agreed that the EAs violated NEPA by "containing only general information about where suppression activities are likely to occur and the effects on resources in those areas." *Id.* at *13. For instance, the Oregon EA covers over 42 million acres in Eastern Oregon, but only contained general descriptions of the geography and resources of that entire possible treatment area. There was no discussion of "whether any of these resources are near areas with recurring or

historical outbreaks or how they might be affected by the Program." *Id.* The Court pointed to public comments for why this analysis mattered, which cited popular recreation areas near historical treatments. Although the Court acknowledged that "forecasting pesticide treatments will be imprecise," it found that "[l]ikely treatment areas are far from unknowable" and the state-level EAs must contain more site-specific detail to satisfy NEPA. *Id.* at 14.

2. Baseline Information

Second, the state-level EAs lacked adequate baseline information. The EAs were required to contain information about past pesticide treatments and their effects on the environment. General historical data without any discussion in the EAs was insufficient to satisfy NEPA. Additionally, as with the EIS, the EAs were required to contain more baseline information about the status of non-target sensitive species.

3. Hard Look: Cumulative Impacts

Finally, just like the EIS, the EAs failed to adequately analyze the cumulative effects of the Program combined with pesticide applications by other users. The Court rejected APHIS's emphasis on the lack of overlap with other pesticide use, finding "[e]ven if pesticide use by APHIS or other actors on the same plot of land is unlikely, . . . the use of multiple pesticides in a single season in the same general area could have significant effects on an insect population."

Conclusion

In sum, the Court found APHIS's 2019 programmatic EIS and its state-level EAs for Idaho, Oregon, Wyoming, and two regions of Montana violated NEPA and the APA. It ordered further briefing on the appropriate remedy.