

ENR Case Notes, Vol. 53

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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Introduction

Two petitioners challenged the Energy Facility Siting Council's (EFSC) order granting Idaho Power Company's (Idaho Power) request to amend a site certificate to construct a high voltage transmission line, in a follow up to an earlier Supreme Court decision approving the original site certificate in *STOP B2H Coalition v. Or. Dep't of Energy (In re Site Certificate)*, 370 Ore. 792, 525 P.3d 864 (2023). Petitioners made both process and merits arguments, seeking to overturn the approved amendment, but the Supreme Court upheld EFSC's decision on all fronts.

Background

Two petitioners (Gilbert and March) filed three different challenges to EFSC's decision to approve Idaho Power's amended site certificate relating to the construction and development of a high-voltage transmission line. These three petitions were then consolidated before the Supreme Court and addressed comprehensively in this opinion. EFSC and the Oregon Department of Energy appeared in opposition to the petitions.

Oregon law grants the EFSC comprehensive authority for siting, monitoring, and regulating the location, construction, and operation of energy facilities. ORS 469.310. Accordingly, Idaho Power obtained a "site certificate" from EFSC, setting it up to construct its high-voltage transmission line. ORS 469.320; ORS 469.300(11). This site certificate was challenged before the Supreme Court and upheld in *Stop B2H*. The Supreme Court, therefore, limited its analysis in *Gilbert* to questions strictly concerning EFSC's approval of Idaho Power's second amendment to the site certificate in *Stop B2H*, not the original site certificate.

Court's Analysis

1. The Supreme Court's Jurisdiction Over EFSC's Decisions Denying the Right to a Contested Proceeding

As an initial matter, the Court addressed its jurisdiction over the case. Petitioner Gilbert contended that the Circuit Court, not the Supreme Court, had jurisdiction to review EFSC's reliance on OAR 345-027-0371 to deny the Petitioners' request for a contested proceeding challenging the amended site certificate. The Supreme Court rejected this argument, citing ORS 469.403(3) and *Blue Mountain Alliance v. Energy Facility Siting*, 353 Ore. 465, 300 P3d 1203 (2013), for the proposition that the Supreme Court's express jurisdiction to hear challenges to amended site certificates impliedly extends to review of administrative procedures taken relating to an amended site certificate. Petitioners had pointed to a Court of Appeals

Gilbert / March v. Department of Energy, 373 Or 289 (2025), summarized by Cameron Catanzano, Praedium Law Group, PLLC.

decision claiming jurisdiction lay in the Circuit Court, *Friends of Columbia Gorge v. Energy Fac. Siting Coun.*, 314 Ore. App. 143, 498 P3d 875 (2021), *rev den*, 369 Ore. 338, 504 P.3d 1181 (2022) (*Friends II*), but the Supreme Court found this authority unpersuasive.

2. *Petitioners' Non-Jurisdictional Claims*

Having determined Jurisdiction, the Supreme Court went on to evaluate the case's non-jurisdictional claims: (a) that Petitioners were entitled to a contested proceeding prior to EFSC's approval; and (b) that EFSC's approval was substantively improper. The Supreme Court rejected both claims.

a. Petitioners were not entitled to a contested case proceeding prior to EFSC's approval.

The Court first addressed Petitioners' argument that it was entitled to a contested case proceeding under OAR 345-27-0371(9). Under this rule, Petitioners would be entitled to a contested proceeding if Idaho Power's proposed amendment raises "a significant issue of fact or law" reasonably affecting ESFC's determination that Idaho Power's transmission line, as amended, meets applicable laws. *See* OAR 345-27-03.

First, the Court found Petitioners' challenge to the bond provisions did not present "a significant issue of fact or law." Because the general bonding scheme at issue was approved in the initial site certificate, Petitioners' attempt to raise the issue was untimely. Second, Petitioners' contention that surveys were needed for site expansion similarly failed to present "a significant issue." Because the amendment challenged expanded areas where construction was *not* permitted, surveys and other processes were not required.

b. EFSC's approval was proper, and Petitioners' challenge untimely.

Petitioners raised two substantive issues: (i) whether Idaho Power met its bonding requirements in OAR 345-022-0050; and (ii) whether the site boundary could be expanded without surveys. The Supreme Court rejected both.

- i. EFSC was within its discretion to grant Idaho Power a nominal construction bond for the transmission line's first 50 years of operation, and the Petitioners' challenge to this was untimely.

EFSC cannot approve a site certificate without (1) determining the site can be adequately restored after the facility is decommissioned, and (2) setting a bond or letter of credit in a form and an amount satisfactory to such restoration. *See* OAR 345-022-00050(1); OAR 345-025-0006(8). In Idaho Power's original site certification,

Gilbert / March v. Department of Energy, 373 Or 289 (2025), summarized by Cameron Catanzano, Praedium Law Group, PLLC.

EFSC approved a nominal \$1 bond for the first 50 years of the transmission line's operation, rising annually until 100 years, when the bond would finally reach the full expected recovery cost. During the second amended site certificate, challenged by petitioners, EFSC recalculated these restoration costs and adjusted the final bond amount accordingly.

As discussed above, the Supreme Court found that any challenge to the underlying structure of the nominal bond is untimely since it was first approved during the original *Stop B2H* litigation. It found no error in EFSC's determination that the amendment of the final bond amount (at 100 years) was adequate to meet restoration needs after the transmission line's decommissioning.

ii. The amendment to the site boundary did not require surveys.

Site boundaries are split into two categories: where construction could occur, and where it could *not*. As discussed above, the amendments challenged by Petitioners involved portions of the site boundary where construction could *not* occur.

Petitioners cited OAR 345-027-0375(2)(a) for the proposition that surveys are required for all amendments to the site boundary. The Supreme Court, however, rejected this argument, stating that surveys are only required for "the portion of the facility" inside the area added by the amendment. *Id.* And because the energy facility itself cannot be placed in areas where construction is not allowed, surveys are not required for areas where no construction is permitted.

Petitioners countered by arguing that Idaho Power could still, at a later point, construct the facility in these areas. However, the Supreme Court identified nothing in EFSC's order that would allow this to occur without subsequent legal review and approvals. The Court again affirmed the order.

Conclusion

The Supreme Court affirmed EFSC's approval of Idaho Power's amended site certificate, rejecting Petitioners' claims on both procedure and merits. The Supreme Court had exclusive jurisdiction to resolve all Petitioners' claims. Petitioners were not entitled to a contested case hearing, the amended bond was adequate, and EFSC was correct in not requiring a survey in areas where construction of the transmission line could not occur.

Hayes Oyster Co. v. Department of Environmental Quality, 338 Or App 692 (Mar. 12, 2025), summarized by Jessica Ann Bernardini, Miller Nash LLP.

Introduction

On March 12, 2025, the Court affirmed the trial court’s grant of Oregon Department of Environmental Quality’s (“DEQ”) motion for summary judgment, finding that the Hayes Oyster Company (“Petitioner”) did not have standing to seek petition for judicial review of a permit modification to the Port of Tillamook Bay’s (“the Port”) Solid Waste Disposal Site Permit (“Permit”).

Background

Prior to 2020, the Port operated a digester that was permitted to accept Type 2 feedstocks (manure). In 2020, DEQ issued a permit modification allowing the Port to process Type 3 feedstocks (food waste), in addition to manure, in its digester. The digester generates digestate, which the Port sells to agricultural partners so they can apply the digestate to their lands. The Permit does not regulate the land application of digestate, it only conditions that POTB receive approval from DEQ regarding “any use of liquid digestate and location of use.”

Petitioner is an oyster harvesting company that operates in Tillamook Bay. Tillamook Bay experiences shellfish harvest restrictions stemming from fecal coliform contamination. Petitioner sought judicial review of DEQ’s actions, contending that the Permit modification allowing the Port to accept food waste should be set aside for two reasons: 1) DEQ incorrectly assumed that digestate from food waste may be applied to land pursuant to a Confined Animal Feeding Operation (“CAFO”) permit; and 2) DEQ failed to establish that discharges of fecal coliform from the Port’s digestate will not cause the water quality issues resulting in restricted harvesting in Tillamook Bay.

DEQ moved for summary judgment asserting Petitioner lacked standing under ORS 183.480 to challenge the agency action. The trial court granted DEQ’s motion, ruling that DEQ provided undisputed evidence that the digester decreases the amount of fecal coliform entering Tillamook Bay, and there was no evidence in the record that the Petitioner had suffered an injury resulting directly from the digester permit. Thus, Petitioner lacked standing to challenge the agency order. Petitioner appealed, arguing the trial court erred when it dismissed its petition on the basis that Petitioner must have “suffered an injury to a personal stake in the outcome of the controversy to have standing” to challenge DEQ’s Permit modification. *Hayes Oyster Co.*, 338 Or. App. at 694.

The Court’s Analysis

To evaluate whether Petitioner satisfied standing under ORS 183.480, the Court applied the three factors in *People for the Ethical Treatment v. Inst. Animal Care*

***Hayes Oyster Co. v. Department of Environmental Quality*, 338 Or App 692 (Mar. 12, 2025), summarized by Jessica Ann Bernardini, Miller Nash LLP.**

(“PETA”), 312 Or. 95 (1991): “(1) the person has suffered an injury to a substantial interest resulting directly from the challenged governmental action; (2) the person seeks to further an interest that the legislature expressly wished to have considered; or (3) the person has such a personal stake in the outcome of the controversy as to assure concrete adverseness to the proceeding.” *Id.* at 101–02. If Petitioner could satisfy one PETA factor, the Court would find Petitioner had standing to challenge DEQ’s Permit modification.

Petitioner first asserted it satisfied the first PETA factor. As to this factor, the Petitioner must show a “nonspeculative interest that petitioner’s interests will be injured as a consequence of the action.” *Hayes Oyster Co.*, 338 Or. App. at 698. Petitioner contended when the digestate is applied to CAFOs, it has the potential to increase fecal coliform levels and so Petitioner suffered an injury to a substantial interest—“reduction in its ability to harvest shellfish—resulting directly from the grant of the permit.” *Id.* The Court disposed of this argument, finding Petitioner failed to overcome DEQ’s un rebutted evidence that the Type 3 feedstock is low in fecal coliform before it enters the digester, and thus, Petitioner failed to provide any evidence that would support a “nonspeculative inference.” The Court held that Petitioner needed more than an apprehension that the action would injure its interests.

Petitioner next asserted that it satisfied the third PETA factor because it has a personal stake in the outcome as its ability to harvest oysters is directly impaired by the stormwater that discharges into Tillamook Bay. The Court applied its holding in *Talbot*, that a “personal stake in the outcome means that the agency’s decision will legally affect the petitioner in some way.” *Id.* at 700 (citing *Multnomah County v. Talbot*, 56 Or App 235, 242-43 (1982)). The Court found Petitioner failed to satisfy the third PETA factor because Petitioner is not legally affected in any way by the Permit modification.

Conclusion

The Court affirmed the trial court’s dismissal of Petitioner’s petition for judicial review, concluding that Petitioner does not have the requisite standing in the case to challenge DEQ’s decision to allow the Port to accept food waste into its digester.

Introduction

On December 26, 2024, the Oregon Court of Appeals reversed and remanded the decision of the Deschutes County Circuit Court awarding possession of the Allotments at issue to Respondents Ambers and Bonnie Thornburgh, concluding that Petitioners Awbrey Cyrus et al. held a valid permit issued by the U.S. Bureau of Land Management (“BLM”) authorizing them to graze on those Allotments. In a narrow opinion, the Court addressed the question before it as: in a state nonresidential forcible entry and detainer action (“FED”), could the Circuit Court prohibit a party from using land owned by the federal government when the BLM had, in its discretion, authorized that party to use the land. Answering no, the Court concluded that Petitioners held a valid, BLM-issued permit to use the Allotments for grazing their livestock.

Background

At issue were the Cline Butte, Fryrear Butte, and Desert Springs Allotments, consisting of approximately 30,000 acres of BLM land designated and managed for grazing livestock under the Taylor Grazing Act (“TGA”). Respondents own land abutting the Allotments and held a BLM-issued grazing permit that ran from 2016 to 2026. In 2020, the parties agreed to lease Respondents’ permit to Petitioners and BLM issued Petitioners a permit running from 2020 to 2030. In 2023, Petitioners failed to make payment to Respondents required under the lease agreement, who filed a FED action with the state Circuit Court.

Under Oregon law, a FED action is designed to quickly resolve a narrow issue between landlords and tenants: who is entitled to possession of the property at issue. Under Oregon’s FED statutes, the court must determine whether the tenant is entitled to possession before they can be forcibly evicted. The Court explained that, under the TGA, the Secretary of the Department of the Interior serves as, in effect, the landlord granted Congressional authority to issue discretionary grazing privileges, and the Department has the authority to modify, cancel, or determine to not renew or lease those privileges for various reasons.

The Court’s Analysis

The Court reasoned that the Circuit Court awarded Respondents possession of the grazing permit because Petitioners had breached the lease agreement between the parties by failing to pay—but concluded that the breach did not render Petitioners’ grazing permit invalid because the BLM had, in its discretion, issued the permit, and there was no federal statute or regulation, or language within the terms of the permit itself, that would support the Circuit Court’s conclusion. Further, the Court

Thornburgh v. Cyrus, 337 Or App 22 (Dec. 24, 2024), summarized by Sarah Melton, American Forest Resource Council.

explained, its determination that Petitioners' permit was valid would be the same even if BLM would not have issued the grazing permit without Respondents' consent due to the lease agreement between the parties: when a party has authorization to use federal land pursuant to federal law, a state FED proceeding cannot be used to oust them from that land.

Conclusion

The Court concluded that Respondents were not without another remedy for Petitioners' breach of the lease agreement between the parties, but limited its opinion to whether the Circuit Court had erred when prohibiting Petitioners from grazing their livestock on land where they were expressly authorized to do so under federal law through their BLM-issued permit.

Introduction

On February 12, 2025, Oregon District Court Judge Aiken adopted in full Magistrate Judge Clarke’s Findings and Recommendation (“F&R”), ruling in favor of the U.S. Bureau of Land Management (“BLM”) in a challenge to the agency’s 2015 amendment to its 2003 resource management plan (“RMP”). Plaintiff Cahill Ranches, Inc., alleged violations of the Federal Land Policy and Management Act (“FLPMA”), the Taylor Grazing Act (“TGA”), and the Administrative Procedure Act (“APA”) arising from the agency’s 2015 RMP amendment, which removed grazing use from research natural areas (RNA) to facilitate research on the sage-grouse. Oregon Natural Desert Association (“ONDA”) intervened in support of BLM.

Background

Plaintiff has grazed livestock on BLM-managed lands in Lake County, Oregon, for decades, holding a permit to graze on six allotments, including the Rahilly-Gravelly Allotment (“RGA”), which in total is comprised of approximately 33,285 acres of public land and 2,031 acres of private land along the south end of the Warner Valley in south-central Oregon. Specifically, Plaintiff has grazed livestock on the RGA since 1913 and relies annually on the pastures within the RGA. BLM’s 2003 RMP carved out approximately 18,691 acres of the RGA for designation as an Area of Critical Environmental Concern (“ACEC”) and Research Natural Area (“RNA”). Grazing was allowed to continue in the area based on existing permits and allotment management plans, but any proposed changes in use would need to be analyzed and modified to mitigate adverse environmental impacts.

In 2010, the U.S. Fish and Wildlife Service determined the sage-grouse warranted broad conservation management throughout the West to prevent future listings under the Endangered Species Act. In 2015, BLM issued the Oregon Greater Sage-Grouse Approved RMP amendment, which removed grazing use from fifteen Key RNAs to facilitate research on plant communities vital to the sage-grouse. Approximately 8,282 acres of the Rahilly-Gravelly ACEC/RNA were allocated as a Key RNA and made unavailable to grazing. Grazing was allowed in the remaining pastures and open areas within the RGA.

Plaintiff first challenged the 2015 RMP amendment in June 2017, but in March 2019 BLM reopened Key RNAs to grazing use through a 2019 RMP amendment and Plaintiff dismissed their challenge. In October 2019, the Idaho District Court enjoined the 2019 amendment and reinstated the 2015 amendment, again closing Key RNAs to grazing, and in 2021, Plaintiff revived their challenge.

The Court's Analysis

1. Plaintiff's Federal Land Policy and Management Act Claims

Plaintiff argued BLM violated FLPMA in three ways: 1) by failing to examine range conditions prior to eliminating grazing use; 2) by modifying the purpose of the Rahilly-Gravelly RNA without adequate public process; and 3) and by contravening FLPMA's management mandates. The Court explained that FLPMA defines BLM's land management authority and requires that public lands are managed under the principles of multiple use and sustained yield, in accordance with RMPs, striking balance amongst competing uses.

The Court first held FLPMA does not require BLM to re-examine range conditions prior to amending or modifying grazing use, or to making management changes in an RMP. Plaintiff argued that, through the 2015 amendment, BLM made significant changes to permits and leases without first determining that the conditions or range health warranted restricting allowed grazing use. The Court explained that BLM's selection of land to include in the Rahilly-Gravelly ACEC/RNA was not based on health, conditions, or the incompatibility of grazing with the sage-grouse, but instead on the presence and conditions of plant communities important to sage-grouse survival for research, monitoring, and conservation.

Next, the Court held that the 2015 RMP amendment did not modify the purpose of the Rahilly-Gravelly ACEC/RNA and so no public process was lacking. Though the Court agreed with Plaintiff that BLM's discretion to modify uses of public land was not unlimited, it also found Plaintiff had failed to provide any support that the modification required BLM to fulfill missing, or follow additional, procedural requirements.

Lastly, the Court held FLPMA's multiple use and sustained yield management principles did not preclude Key RNAs from focusing on research and conservation. Plaintiff argued the 2015 RMP amendment and grazing prohibitions essentially converted those Key RNAs areas for one use. The Court explained that BLM was not required to allow all competing uses for a particular area, nor required to elevate grazing above other uses, and could dedicate specific areas within a larger allotment for research, education, and conservation.

2. Plaintiff's Taylor Grazing Act claim

Plaintiff claimed that, under the TGA, once a grazing district is established, BLM must assess whether the lands at issue are still chiefly valuable for grazing and

***Cahill Ranches, Inc. v. Bureau of Land Management*, No. 1:21-CV-01363-CL, 2025 WL 472260 (D. Or. Feb. 12, 2025), summarized by Sarah Melton, American Forest Resource Council.**

raising livestock forage crops before the agency can remove grazing use from that district. The Court explained that, under the TGA, public lands are divided into grazing districts, the amount of grazing permitted in each district is determined, and then leases and permits for grazing are issued for fees. Though these grazing privileges must be adequately safeguarded, they do not create any right, title, interest, or estate in or to the lands.

The Court held Plaintiff failed to provide any supportive authority to support its claim, which therefore failed as a matter of law. The TGA did not require BLM to revisit the original chiefly valuable grazing classification prior to modifying grazing through the 2015 RMP amendment.

Conclusion

The Court concluded BLM's 2015 RMP amendment complied with FLMPA and the TGA, was not arbitrary or capricious under the APA, and declined to determine whether Plaintiff's request for relief was appropriate.¹ Having considered the parties' Objections and Responses to the F&R, the Court entered judgment in favor of BLM and ONDA. Plaintiff filed a Notice of Appeal with the Ninth Circuit on April 11, 2025.

¹ Additionally, the Court found BLM and ONDA's motions to strike letters attached to Plaintiff's declaration were moot because Plaintiff's standing was not challenged, and the Court had previously denied their motion to supplement the record with those two letters as inadmissible extra-record evidence outside of any exception.

***Willamette Riverkeeper v. National Marine Fisheries Service*, No. 6:21-CV-00034-AA, 2025 WL 253391 (D. Or. Jan. 21, 2025), summarized by Brett Palmer, Miller Nash LLP.**

Willamette Riverkeeper, et al., (“Plaintiffs”) are environmental advocacy organizations dedicated to protecting and restoring the Willamette River. This lawsuit involves wild winter steelhead in the Upper Willamette River – a distinct population of salmonids listed as threatened under the Endangered Species Act (“ESA”). Plaintiffs contended that the ongoing release by State and Federal agencies of hatchery-raised summer steelhead into the Willamette River system jeopardizes the already-threatened existence of the native winter steelhead.

Background

During the twentieth century, the United States Army Corps of Engineers built a series of dams on the Willamette River, which destroyed and degraded habitat resulting in a precipitous decline in the population of native fish, including the winter steelhead. Since 1999, the National Marine Fisheries Service (“NMFS”) has listed the winter steelhead as a threatened species under the ESA.

Winter steelhead do not remain in the river during the summer fishing season. To provide fishing opportunities in the Willamette River during the summer, the Oregon Department of Fish and Wildlife (“ODFW”) releases hundreds of thousands of hatchery-raised summer steelhead into the river each year. Summer steelhead are not native to the Willamette River, are not endangered, and provide no conservation benefit.

It is undisputed that summer steelhead have an adverse effect on the native winter steelhead. In 2008, NMFS issued a Biological Opinion (“BiOp”) finding that the summer steelhead releases jeopardize the continued existence of the threatened winter steelhead population. NMFS proposed that the Corps submit to NMFS a Hatchery and Genetic Management Plan (“Management Plan”) to reduce and minimize adverse effects to winter steelhead. In 2018, the Corps submitted to NMFS a Management Plan for the summer steelhead hatchery program, which is the plan at issue in this case. The Management Plan proposed three mitigation measures to reduce the adverse impact of summer steelhead on the native winter steelhead population: (1) reducing the total number of summer steelhead released annually; (2) ending the “recycling” of summer steelhead caught and released back into the Willamette River; and (3) releasing summer steelhead earlier in the year to reduce interactions between summer and winter steelhead populations. The Management Plan asserted that these mitigation measures would limit the “gene flow” (i.e., the transfer of genetic material from one population to another) from summer steelhead to winter steelhead to under two percent.

In 2019, NMFS issued a BiOp on the effects of the summer steelhead hatchery program as described in the Management Plan. The 2019 BiOp stated that, even with the Management Plan revisions, the program would continue to cause risks for

the winter steelhead population and did not provide conservation or recovery benefits for the threatened winter steelhead. That said, NMFS concluded in the 2019 BiOp that the hatchery program, as modified by the Management Plan, ultimately would not jeopardize the continued existence of the winter steelhead. NMFS prepared an environmental impact statement (“EIS”) evaluating the Management Plan under the National Environmental Policy Act (“NEPA”) and issued a Record of Decision authorizing the Management Plan for the summer steelhead hatchery program. Finally, after concluding that the hatchery program would cause incidental “take” of threatened winter steelhead, NMFS included in the 2019 BiOp an incidental take statement (“ITS”) exempting incidental take of winter steelhead from liability under ESA.

Procedural History

Plaintiffs filed suit against the United States Fish and Wildlife Service (“FWS”), the Corps, NMFS, and ODFW claiming violations of ESA, NEPA, and the Administrative Procedure Act (“Act”) for each agency’s respective role in releases of hatchery-raised summer steelhead into the Willamette River. Plaintiffs subsequently moved for summary judgment seeking a ruling that the Corps and FWS violated the ESA by funding and facilitating releases of summer steelhead. Plaintiffs’ motion for summary judgment also sought a ruling that NMFS violated the ESA by issuing an unlawful BiOp finding that the hatchery program does not jeopardize the continued existence of winter steelhead and that NMFS violated both ESA and NEPA by approving the Management Plan. Defendants cross-moved for summary judgment on all claims.

Legal Analysis

1. Plaintiffs Lacked Standing to Pursue ESA Claims Against the Corps and FWS

As an initial matter, the Court dismissed Plaintiffs’ ESA claims against both FWS and the Corps because it found that Plaintiffs lacked standing. As to FWS, the Court determined Plaintiffs’ asserted injury failed the causation prong of the standing test because it was not “fairly traceable” to FWS since the agency neither funds nor facilitates the release of summer steelhead into the Willamette River. Though the Corps does facilitate the release of summer steelhead, the Court found that Plaintiffs’ claim against the Corps failed the redressability prong of the standing test because the relief sought by Plaintiffs against the Corps—a court order declaring that the Corps violated the ESA—would not end the release of summer steelhead. Therefore, the Court dismissed the claims against these two Defendants, and only the claims against NMFS and ODFW remained.

2. *Defendants Did Not Use the Best Scientific Data Under the ESA to Assess the Environmental Baseline*

Plaintiffs asserted that Defendants failed to use “the best scientific and commercial data available” when formulating the 2019 BiOp as required by the ESA. Plaintiffs claimed Defendants failed to meet this standard in assessing: (1) the environmental baseline; (2) the summer steelhead population data; (3) the residual summer steelhead population data; and (4) the effect of fishing on winter steelhead. The Court disagreed with Plaintiffs on all issues except one. It found the BiOp did not adequately consider evidence of degraded habitat conditions on winter steelhead eggs in determining the environmental baseline and granted summary judgment for Plaintiffs on that ground.

3. *The BiOp Was Arbitrary and Capricious Regarding Competition, Displacement, and Climate Change*

The Court next considered whether the 2019 BiOp was arbitrary and capricious under the APA. Plaintiffs first contended the BiOp was arbitrary and capricious because Defendants downplayed or ignored the ecological impacts of summer steelhead on winter steelhead, including predation, competition, and displacement of native fish by larger, hatchery-released fish. In this vein, Plaintiffs also challenged the BiOp’s use of the Predation-Competition-Disease (“PCD”) risk model and the data inputs used by Defendants to calculate these ecological impacts. The Court rejected Plaintiffs’ arguments on predation and use of the PCD risk model, finding that Plaintiffs had not demonstrated the BiOp was not rational on these points. The Court found, however, the BiOp’s conclusion that competition between the species would have a “low effect” on winter steelhead ran counter to the EIS and BiOp’s findings that summer steelhead yearlings released months before winter steelhead fry emerge would have a competitive advantage in occupying choice feeding territories. Likewise, the Court found the BiOp failed to adequately consider the extent or impact of displacement of winter steelhead by larger, more numerous hatchery-released summer steelhead.

In addition, Plaintiffs argued the BiOp was arbitrary and capricious because it failed to evaluate the cumulative impact of both summer steelhead and the “serious implications” of climate change on already depressed winter steelhead populations. The Court agreed with Plaintiffs, finding the BiOp’s conclusion that the effects of climate change on winter steelhead would not be as severe as the impacts on other fish species was insufficient to describe the impact of climate change on winter steelhead.

4. The BiOp's Use of "Gene Flow" Standard for No Jeopardy Finding was Arbitrary and Capricious

Next, the Court evaluated Plaintiffs' claims that the BiOp's finding that the program would not jeopardize the continued existence of the winter steelhead was arbitrary and capricious. First, Plaintiffs argued that Defendants' use of the two percent "gene flow" standard from summer to winter steelhead populations was inappropriate because, due to a lack of reliable data assessing current gene flow, that standard had not been and could not be demonstrably met. The Court agreed with Plaintiffs, citing the BiOp's statement that "any interbreeding" between the species would result in negative impacts on winter steelhead. The Court also found that NMFS' conclusion of no jeopardy was unsupported by the data it relied on, which did not demonstrate with any certainty that gene flow could be reliably or accurately calculated.

Second, Plaintiffs asserted that the BiOp's reliance on the three mitigation measures (releasing summer steelhead earlier in the season, suspending the return of captured summer steelhead back into the river, and reducing release rates of hatchery-raised fish) was arbitrary and capricious because these were optional measures that ODFW could later reverse. The Court disagreed, finding that each of the mitigation measures was already in place and could be reversed only if supported by new scientific research and approved by NMFS.

5. The ITS Was Not Arbitrary and Capricious

As required by the ESA where an agency finds a proposed action will not jeopardize a listed species, NMFS prepared an ITS to address the take of individual winter steelhead due to genetic and ecological effects of summer steelhead. Plaintiffs argued the ITS was arbitrary and capricious because it allowed variability of up to ten percent in a single year for both total number and size of released summer steelhead, the impact of which was not evaluated by the BiOp. The Court disagreed. First, these limits are calculated on a five-year rolling average, so even if a release exceeds the limit in a single year, fewer fish would be released in the following years to ensure the *average* releases align with the BiOp's limits. Second, the data cited in both the BiOp and Management Plan included releases of comparable sizes, so NMFS had adequately considered the impact of larger releases in its BiOp. Additionally, the Court rejected Plaintiffs' arguments that the ITS should have included genetic-based take limits and that the ITS improperly relied on "current gene-flow" as a measure of incidental take.

6. *Defendants Complied with NEPA's Requirement to Evaluate Reasonable Alternatives*

Finally, Plaintiffs argued Defendants failed to adhere to NEPA's requirement to evaluate the effects of "all reasonable alternatives" in the EIS. The EIS examined five alternatives related to the release of hatchery-raised summer steelhead: 1) maintaining existing release levels; 2) maintaining existing levels and implementing additional best practices; 3) replacing introduction of summer steelhead with introduction of winter steelhead; 4) terminating introduction of all hatchery programs; and 5) increasing introduction. Plaintiffs took issue with alternative four—terminating introduction of all hatchery programs—because they alleged it examined the impact of eliminating *all* hatchery programs, including that of listed Spring Chinook, rather than only the summer steelhead program. The Court disagreed, finding the EIS did evaluate the independent impacts of varying the levels of introduced summer steelhead on winter steelhead populations. The Court also concluded that NMFS complied with its obligation under NEPA to consider a reasonable range of alternatives to assess environmental impacts.

Conclusion

In sum, the Court granted in part and denied in part both Plaintiffs' motion for summary judgment and Defendants' cross-motion for summary judgment. As to remedy, the Court recognized that vacatur of unlawful agency action is the presumptive remedy under the APA, but that courts remand without vacatur when equity demands. Here, the Court found vacating the BiOp would be disruptive and would not benefit the winter steelhead because the BiOp included beneficial mitigation measures and directives to conduct additional research that may shed light on the appropriate remedies. Therefore, the Court ordered additional briefing by the parties on the appropriate remedy for the BiOp's legal shortcomings.