

ENR Case Notes, Vol. 55

Recent Environmental Cases and Rules

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Environmental & Natural Resources Section
OREGON STATE BAR
November 2025

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

A special thank you to our contributors: Cameron Catanzano, Praedium Law Group, PLLC; Rebekah Dohrman, Dohrman Land Law, LLC; Michael Kinsey; Andrew Missel, Advocates for the West; David Samuels, Larkins Vacura Kayser LLP; and Ryan Shannon, the Center for Biological Diversity.

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East Valley Water v. Water Resources Commission, 374 Or. 148 (Aug. 7, 2025), summarized by Michael Kinsey.

Introduction

On August 7, 2025, the Oregon Supreme Court affirmed in part and reversed in part the Oregon Court of Appeals opinion, and reversed the Oregon Water Resources Commission (Commission) order denying an irrigation district's application for a water right permit.

Background

Surface water use in Oregon, as in most western states, is governed by the principles of prior appropriation, as codified by the Oregon Water Rights Act (Act). *See* ORS 537.010, .120.¹ The Oregon Water Resources Department (Department) is authorized to issue a permit to allow for appropriation for beneficial uses, as described in a water right certificate associated with the permit. ORS 537.130(1), .250(1), and .250(3)(a). The Act includes a rebuttable assumption that the proposed use of the water will not impair or be detrimental to the public interest if four specific criteria are met, and specifies the criteria to rebut the presumption. ORS 537.153(2). The Act does not specifically define beneficial uses, but does include examples of beneficial uses, and the Department has further defined what a beneficial use is through adoption of regulations. ORS 537.170(8)(a), (f); OAR 690-077-0010(3). When the Department issues a permit to appropriate water for a beneficial use, which must not impair or detrimentally affect a specific public interest (*see* ORS 537.153(2)(b)), a member of the public may protest the decision to issue the permit. ORS 537.153(6). In the event of a protest, the Director of the Department shall issue a final order, either directly or after a contested case hearing. ORS 537.170(6), .153(8). In the event of a contested case hearing, an administrative law judge (ALJ) will issue a proposed order, including recommended findings of fact and conclusions of law. ORS 183.470(2). After the Director issues the final order, any person may file exceptions to the final order with the Commission. ORS 537.173(1). The Commission will issue a modified order or an order denying the exceptions. ORS 537.173(2). The Court of Appeals has jurisdiction over judicial review of a Commission's order from a contested case. ORS 536.075(2).

Procedural History

The East Valley Water District (District) proposed to build a dam and create a water storage reservoir on Drift Creek and some associated tributaries in Marion

¹ The Oregon legislature has amended the Act (2025 Oregon Laws Ch. 575 (H.B. 3544)). The Court's opinion cites to the statutes in effect at the time of the underlying action. This summary cites to the provisions as cited by the Court.

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County, Oregon. In 2013, the District applied for a permit, and in 2014, the Department issued a proposed order recommending approval of the permit application. In doing so, the Department made specific findings, including that after considering the factors described in the statute, the permit was in the public interest. Members of the public protested the proposed decision, alleging that, among other things, the proposed permit would interfere with a prior water right on Drift Creek held by one of the protestors. The prior right was for in-stream flows for the benefit of native cutthroat trout for the support of early life stages for the species; Protestors alleged that a reservoir on Drift Creek would interfere with that right.

The Director sent the matter to an ALJ for a contested case hearing. The ALJ issued a proposed order recommending that the permit be issued as proposed, with only minor modifications. The protestors filed exceptions to the proposed order, and the Director issued the permit as proposed. The Director found that the proposed permit would not injure the prior water right on Drift Creek because the proposed dam would not store water until the senior right was satisfied, and the prior appropriation system would protect the senior right. The protestors filed exceptions to the Director's order with the Commission, which issued a final order reversing the permit, on the basis that the proposed use would be detrimental to the public interest because it would interfere with the senior water right.² The Commission therefore denied the permit. The District sought review with the Court of Appeals, which affirmed the Commission's order.

The Court's Analysis

1. Protection of a Senior Water Rights Holder's Entitlement to Appropriate Water

The Court first considered the District's contention that consideration of all vested and inchoate water rights and the means necessary to protect such rights is nothing more than the legislature's intention to codify the prior appropriation doctrine. The District asserted that the legislature did not intend the statute to permit the Commission to consider anything other than water quantity.

The Court accepted the Commission's findings of fact, and assumed that a senior water right holder would be "injured" only if the senior holder would not receive the

² The Commission specifically noted that they were not determining that a water storage permit would in all cases necessarily interfere with an in-stream right, only that under the facts and record of the case presented to them the permit would interfere with the senior right.

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quantity of water to which they are legally entitled. The Court first found that it had to determine the nature of the interest protected by ORS 157.170(8)(f). The Court surveyed the caselaw, legislative history, and statutory provisions going back to the enactment of the Act in 1909, and determined that a water right confers not just the right to a quantity of water, but also the right to continue the specified beneficial use of that water. The Court found that, “the nature or purpose of the use stated in a water-right certificate is a distinct, integral aspect of a water right entitled to protection.” 374 Or. at 167. The Court then held that the legislature recognized the need to protect both the right to the quantity of water and the right to continue the specified beneficial use of that water, and “expressly required the director or the commission to consider them *both* before making a final decision whether to issue a new water-right certificate.” *Id.* at 175. (emphasis in original). Because the Commission had done exactly that in making its determination that the use proposed by the District would impair or detrimentally affect the senior water right on Drift Creek, the Court concluded that the Court of Appeals did not err in affirming the Commission’s decision. The Court therefore affirmed the Commission’s conclusion that, because the proposed use would frustrate the beneficial use by the senior water right, the rebuttable presumption that the District’s proposed water right was in the public interest was overcome.

2. Consideration of All Seven Public Interest Factors Before Making a Final Determination on the Permit

The District next argued that the Commission was required to balance the seven public interest factors listed in the statute before determining that the proposed use was not in the public interest. Alternatively, the District argued that the Commission was required to consider all seven statutory factors, even if one factor alone was sufficient to rebut the presumption. The Court gave short shrift to the District’s first argument, finding that it was foreclosed by the plain language of the Act, and that the Commission was entitled to rely on a single public interest factor when concluding that the presumption was overcome.

Turning to the District’s alternative argument, the Court agreed with the District that the Commission, having determined that the presumption of public interest was overcome, was next required to perform a balancing test of each factor to make a final determination as to the ultimate public interest, based on the language of the Act. The Court summarized the Act as requiring two separate steps. The Commission first determines whether the presumption is overcome by one (or more) of the public interest factors listed in ORS 537.170(8). After the presumption has been rebutted, the Commission – before issuing a final order – must then take the second step and “make the final determination of whether the proposed use or the

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proposed use as modified in the proposed final order would impair or be detrimental to the public interest by considering” the seven statutory factors.

While the Director had specifically considered all seven factors, in the final order denying the permit, the Commission “expressly disavowed any need to consider the remaining factors.” *Id.* at 180. Because the Commission determined that the presumption was overcome, it believed it had no obligation to consider the other factors. The Court therefore determined that the Court of Appeals decision affirming the Commission was in error. The Court specifically did not reach the final piece of the District’s argument about balancing the factors, holding instead that because the Commission had failed before that point, there was no need to consider the balancing argument. The Court noted that, on remand, the parties were free to make their competing arguments to the Commission.

Conclusion

The Commission and the Court of Appeals did not err when they interpreted the recognized public interest in “vested and inchoate” water rights and the means to protect those rights as protecting both the quantity of water and the beneficial use of that water associated with a senior water right. The Commission’s finding that the beneficial use of a senior water right would be frustrated by the District’s proposed permit, and thus that the public interest presumption was rebutted, was therefore correct. In reaching its determination, the Commission, however, relied on its erroneous interpretation of the statute and failed to consider all seven of the statutorily recognized public interest factors. Therefore, the Commission erred in its final order and the Court of Appeals erred in affirming that order. The Court affirmed in part and reversed in part the Court of Appeals, reversed the Commission’s order, and remanded to the Commission for further proceedings.

In dissent, Justice Bushong agreed with the majority as to the first point (the need to protect both rights). The Justice disagreed with the majority as to the second, and would have found that the Commission’s final order complied with the statutory provisions, considered all seven factors, and concluded that the factors did not warrant issuing the permit to the District. Ultimately, the Justice concluded that the majority found a failure to expressly state that the Commission had considered all seven factors when denying the District’s application for a permit was simply mistaken. Justice Bushong would, therefore, have affirmed the Court of Appeals on both points.

Introduction

Plaintiffs Cascadia Wildlands et al. filed a citizen suit complaint alleging Defendant Eugene Water & Electric Board (“EWEB”) violated Section 9 of the Endangered Species Act (“ESA”) by causing unlawful take of Upper Willamette River (“UWR”) Chinook salmon and bull trout in failing to meet its requirements under an Incidental Take Statement issued by the Fish and Wildlife Service and the National Marine Fisheries Service (“the Services”). Plaintiffs filed a Motion for Preliminary Injunction and Defendant filed a Motion to Dismiss for lack of jurisdiction, claiming that the Federal Power Act (“FPA”) gave the 9th Circuit exclusive jurisdiction over the case. The District Court granted Defendant’s Motion to Dismiss, and dismissed the case without prejudice. Without addressing the merits, the District Court denied Plaintiff’s Motion for Preliminary Injunction as moot.

Background

Defendant EWEB owns and operates the Carmen-Smith Hydroelectric Project (“the Project”), which is licensed by the Federal Energy Regulatory Commission (“FERC”) under the Federal Power Act (“FPA”). *See* 16 U.S.C. § 797(e). The Project consists of three dams, three reservoirs, and two powerhouses on the McKenzie River. The lowermost dam—the Trail Bridge Dam—stands as an absolute barrier to upstream fish passage for UWR Chinook salmon and bull trout, which are listed species under the ESA. Trail Bridge Dam prevents these species from accessing upstream critical habitat and inhibits migration and other behaviors.

In 2006, EWEB applied to renew its license with FERC. As part of the relicensing process, FERC initiated an ESA Section 7 consultation with the Services, who issued Biological Opinions concluding that the proposed relicensing would not jeopardize the continued existence of UWR Chinook salmon or bull trout, or adversely modify their habitat. These findings were premised on Defendant’s timely implementation of certain conservation measures, including fish passage measures. These conservation were made requirements of the accompanying Incidental Take Statements.

In 2019, after years of delay and various analyses, FERC approved the Project’s relicensure and incorporated the Services’ Incidental Take Statements directly into the Project’s license. The Incidental Take Statements required EWEB to complete a new fish passage facility at the lowermost dam and implement other measures for fish passage at the Project by May 2022.

In the years following the Project’s relicensing, Defendant failed to meet the deadlines for the fish passage measures. Defendant notified FERC of its noncompliance and requested new deadlines. In late 2023 and early 2024, the Services notified FERC of

Defendant's noncompliance and explained that it could no longer rely on the Biological Opinions without reinitiating consultation. At the time of Plaintiffs' complaint, Defendant had not begun construction of the fish passage measures.

Plaintiffs filed this lawsuit and moved for a preliminary injunction, alleging that Defendant is liable for unlawful "take" of listed UWR Chinook salmon and bull trout under Section 9 of the ESA because the Incidental Take Statements no longer cover Defendant's conduct at the Project. Among its requests for relief, Plaintiffs sought volitional fish passage at Trail Bridge Dam, a measure previously rejected by FERC. Defendant moved to dismiss Plaintiff's case for lack of subject matter jurisdiction, arguing that the Section 313(b) of the FPA gives the Courts of Appeals exclusive jurisdiction over all cases attacking a FERC license.

The Court's Analysis

1. The Circuit Courts' Exclusive Jurisdiction Under the FPA Supersedes the District Courts' Jurisdiction Under the ESA.

First, the Court determined whether the FPA or the ESA's jurisdictional provision applies to this case. Under Section 313(b) of the FPA, challenges to FERC licenses are the "exclusive" jurisdiction of the U.S. Court of Appeals. 16 U.S.C. § 8251(b). Under the ESA, the U.S. District Courts "shall have jurisdiction" to enforce the ESA and its regulations. 16 U.S.C. § 1540(g)(1).

In resolving this conflict, the District Court relied on prior case law, emphasizing the FPA's explicit statement that Circuit Court jurisdiction is "exclusive." *See City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336, 78 S. Ct. 1209, 2 L. Ed. 2d 1345 (1958) ("all objections to... the license... and to the legal competence of the licensee... must be made in the Court of Appeals or not at all.") (emphasis added); *see also California Save Our Streams Council*, 887 F.2d at 911 ("By its express language, the [FPA] provides *exclusive* jurisdiction for the Courts of Appeals..."). By contrast, while "shall" is often interpreted as non-discretionary, the ESA does not explicitly state that District Court jurisdiction is "exclusive." *Cascadia Wildlands*, 2025 WL 2508992 at 11. Therefore, to the extent that Section 313(b) is triggered by this case, the Court found that jurisdiction is found exclusively with the Courts of Appeals.

2. Plaintiffs' Claim Under ESA Section 9 is a "Collateral Attack" on Defendant's FERC License

Next, the Court asked whether FPA Section 313(b) is indeed triggered by Plaintiffs' case such that the district court would lack jurisdiction. As pled, Plaintiff's lawsuit did not implicate or challenge the Project's FERC license. It focused entirely on

EWEB's liability under ESA Section 9. However, the FPA imposes strict jurisdictional limits on challenges to FERC license, and parties cannot avoid this requirement by "creative pleading." *California Save Our Streams Council, Inc. v. Yeutter*, 887 F.2d 908, 911 (9th Cir. 1989). For this reason, when claims are based on the violation of laws other than the FPA, courts must still determine whether the "practical effect of the action" is an "assault on an important ingredient of [a] FERC license." *Id.* at 912.

In its analysis, the District Court emphasized the similarities between this case and *Sauk-Suiattle Indian Tribe v. City of Seattle*, where plaintiffs had also challenged a dam's failure to implement mitigation techniques that had been considered during the licensing process. 56 F.4th 1179, 1187–88 (9th Cir. 2022). In *Sauk-Suiattle*, the Ninth Circuit affirmed the district court's dismissal for lack of jurisdiction under Section 313(b) of the FPA because, despite also bringing a challenge under an "independently significant law," plaintiffs had still "challenged an issue decided by FERC." *Id.* at 1184. In particular, the plaintiffs whether the dam needed to implement a volitional fish passage. *Id.*

Because Plaintiffs' Section 9 take claim also implicated the issue of volitional fish passage—which was considered and addressed by FERC in its licensing order—it constituted a collateral attack on the FERC license. Accordingly, FPA Section 313(b) jurisdiction was triggered, and the District Court granted Defendant's Motion to Dismiss for lack of jurisdiction.

Conclusion

In granting EWEB's Motion to Dismiss, the District Court affirmed two important rules. First, despite the U.S. District Court's jurisdiction over ESA claims, the Circuit Courts maintain "exclusive" jurisdiction over challenges under Section 313(b) of the FPA. Second, because FERC incorporated the Project's Incidental Take Statement into its license and considered the issues of fish passage in the license, Plaintiff's ESA claims were, effectively a "collateral challenge" on a FERC license.

Introduction

The Center for Biological Diversity and the Audubon Society of Portland (now Bird Alliance of Oregon) challenged the U.S. Fish and Wildlife Service’s (“FWS”) 2022 decision to list the streaked horned lark as a threatened—rather than endangered—species under the Endangered Species Act (“ESA”), and to adopt a revised ESA section 4(d) rule exempting agricultural activities from take prohibitions across the lark’s range.

After considering cross-motions for summary judgment, Judge Nelson of the U.S. District Court for the District of Oregon granted plaintiffs’ motion, denied defendants’ motion, and remanded the listing determination to FWS.

The Court’s Analysis

1. Listing Decision

First, the Court found that FWS’s determination to list the lark as threatened rather than endangered was arbitrary and capricious for numerous reasons. It first noted that FWS’s determination failed to consider the impact that small population size *currently* has on the lark, citing record evidence of current genetic issues, skewed sex ratios, and low reproductive success. Opinion at *14–19. The Court noted that FWS’s treatment of the small population effects was inconsistent and sometimes framed as future concerns even though documented as occurring today. *Id.*

The Court also critiqued FWS’s analysis of the lark’s resiliency, including the agency’s reliance on *regional* breeding-pair metrics to assess *local* resiliency. *Id.* at * 21. The Court further took issue with FWS giving equal weight to resiliency factors—such as abundance, population trend, connectivity, and habitat—without explanation, minimizing the importance of extremely small population sizes (often <10 breeding pairs). *Id.* at * 22. Because of these shortcomings, the Court found that FWS failed to demonstrate a rational connection between the record and its conclusion in violation of the ESA and APA.

Additionally, the Court found FWS’s analysis of whether the lark was endangered in a significant portion of its range flawed, noting that it failed to discuss the genetic effects uniquely impacting the lark in the South Puget Lowlands. *Id.* at *31–32.

2. Revised Section 4(d) Rule

Next, the Court took issue with FWS’s revised section 4(d) rule which expanded exemptions for agricultural activities from the prohibition on take to areas of the lark’s range outside of the Willamette Valley. *Id.* at * 35–38. The agency reasoned

***Center for Biological Diversity v. Burgum*, No. 3:23-CV-00150-AN, 2025 WL 2781718 (D. Or. Sept. 29, 2025)**, summarized by Ryan Shannon, the Center for Biological Diversity.

that agriculture creates replacement habitat for larks and that the expansion of the prohibition might encourage landowners to maintain such land in the South Puget Lowlands. *Id.* at *37–38. The Court, however, rejected this rationale because there was no evidence of larks utilizing agricultural lands in Washington or in regions outside of the Willamette Valley. *Id.* at * 38.

3. *Remedy*

On remedy, at Plaintiffs’ request, the Court left the threatened listing determination in place during remand but ordered FWS to prepare a listing determination within one year, finding that such an order was “in accord with the nature of the ESA, which mandates that timeliness in the listing process is essential.” *Id.* at *38–39.

The Court vacated the revised section 4(d) rule and reinstated the 2013 version, where the agricultural exemption was limited to the Willamette Valley, pending a new listing determination. *Id.*

Introduction

In this case, Plaintiffs Columbia Riverkeeper and 1000 Friends of Oregon (collectively, “Columbia Riverkeeper”) challenge a 2022 “determination” made by the U.S. Army Corps of Engineers (“Corps”) that the proponent of a large industrial project does not need permission from the Corps under section 14 of the Rivers and Harbors Act, 33 U.S.C. § 408, to construct the project. The Corps filed a motion to dismiss the case for lack of subject-matter jurisdiction, arguing that (1) Columbia Riverkeeper lacks Article III standing, (2) the “determination” is not “final agency action,” and (3) the case is prudentially unripe. On August 7, 2025, Judge Adrienne Nelson of the U.S. District Court for the District of Oregon denied the motion.

Background

NXTClean Fuels (“NEXT”) seeks to build a “renewable diesel” refinery near Clatskanie, Oregon. The refinery would convert feedstocks like used cooking oil, animal tallow, and soybean oil into renewable diesel fuel and “sustainable aviation” fuel. NEXT’s plan to construct the refinery involves bringing in heavy equipment and building materials by barge to a dock near the facility site and then transporting those materials to the site via truck. To get from the dock to the facility site, the trucks will drive on a portion of a road that is built on top of a federally constructed levee. That levee is operated and maintained by the Beaver Drainage Improvement Company (“BDIC”), a municipal entity. The levee provides flood damage reduction services to area farmers and other residents. According to BDIC, the levee has suffered damage in the past from heavy industrial traffic.

Because building the refinery will require filling in more than 100 acres of wetlands under federal jurisdiction, NEXT needs a Clean Water Act section 404 permit from the Corps. When NEXT submitted an application for a section 404 permit, the application was reviewed by the Corps to determine whether NEXT also needed permission under section 14 of the Rivers and Harbors Act, commonly known as “section 408” due to its codification at 33 U.S.C. § 408. Section 408 makes it illegal

to take possession of or make use of for any purpose, or build upon, alter, deface, destroy, move, injure, obstruct by fastening vessels thereto or otherwise, or in any manner whatever impair the usefulness of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States.

33 U.S.C. § 408(a). Under section 408, the Corps may grant permission for the use, occupancy, or alteration of a covered work if it “will not be injurious to the public interest” and “will not impair the usefulness of such work.” *Id.* The Corps has established a procedure for deciding whether to grant section 408 permission. A violation of section 408 is a criminal offense. 33 U.S.C. § 411.

***Columbia Riverkeeper v. Caswell*, No. 3:24-CV-00868-AN, 2025 WL 2256295 (D. Or. Aug. 7, 2025), summarized by Andrew Missel, Advocates for the West.**

On April 7, 2022, the Corps sent NEXT a letter stating that NEXT did *not* need permission under section 408 to build the refinery. The letter stated that the “proposal is to utilize the levee as a haul road” but concluded that NEXT would “not alter, occupy, or use” the levee, and therefore did not need the Corps’ permission under section 408.

Columbia Riverkeeper filed suit in the District of Oregon in May 2024, claiming that the Corps’ determination that NEXT did not need section 408 permission was arbitrary, capricious, and not in accordance with law under the Administrative Procedure Act (“APA”). In the complaint, Columbia Riverkeeper alleged that the Corps’ decision would harm its members in two distinct ways. First, for Columbia Riverkeeper’s members who rely on the levee for protection from flooding, allowing NEXT to drive heavy equipment over the levee without first ensuring that such use will not damage the levee raises the risk of injury to the levee, which in turn raises the risk of flooding. Second, the refinery, once constructed, will harm Columbia Riverkeeper’s members who live or recreate in the area by degrading various environmental resources. The parties, and the Court, referred to these two types of harm as the “Levee Harms” and the “Refinery Harms,” respectively.

Article III Standing

The Court first concluded that Columbia Riverkeeper had adequately pleaded facts supporting Article III standing. As to injury-in-fact, the Court held that Columbia Riverkeeper did not need to identify individual members with standing at the pleading stage, and that it had adequately alleged facts showing how “the Levee and Refinery Harms will affect [its] members in a personal way.” *Columbia Riverkeeper v. Caswell*, Case No. 3:24-cv-00868-AN, 2025 WL 2256295, at *6 (D. Or. Aug. 7, 2025). The Court also held that the harms were sufficiently likely to occur to support injury-in-fact, despite the fact that the refinery still needs several permits before it can be built. (The Court rejected Columbia Riverkeeper’s argument that the “procedural injury” framework should apply to its claim, but that did not ultimately affect the outcome.)

The Court also rejected the Corps’ factual attacks on standing. For instance, the Corps attempted to show that, in fact, the use of the levee as a haul road would not injure the levee. The Court determined that this attack on standing was “intertwined with the merits” of the case and not subject to resolution on a motion to dismiss. *Id.* at *7.

The Court held that Columbia Riverkeeper had adequately alleged facts to support causation and redressability. As to causation, the Court concluded that, even though the section 408 determination “does not explicitly authorize NEXT’s use of the [r]oad or any construction, as a practical matter, the [determination]

provides that NEXT can use the [r]oad as a haul road without going through Section 408 review.” *Id.* at *8. Because “putting NEXT’s proposal through Section 408 review could help prevent the Levee Harms, regardless of whether the Corps approved or denied the [408] request,” the Court concluded that the Levee Harms are traceable to the Corps’ decision to “excus[e] NEXT’s proposal from Section 408 review.” *Id.* at *9. The Court reasoned that the Refinery Harms are traceable to the Corps’ determination because the complaint contains allegations suggesting that NEXT would not be able to obtain permission under section 408 due to BDIC’s opposition.

As to redressability, the Court held that “vacatur of the [determination] would, as a practical matter, require NEXT to go through Section 408 review,” thus preventing or reducing the Levee and Refinery Harms. *Id.* at *9. The Court’s analysis of redressability essentially mirrored its analysis of causation, reflecting the Court’s recitation of the principle that causation and redressability are “two facets of a single causation requirement.” *Id.* at *8 (quoting *Wash. Env’t Council v. Bellon*, 732 F.3d 1131, 1146 (9th Cir. 2013)) (internal quotation marks omitted).

Final Agency Action

The Court next addressed the issue of whether the Corps’ section 408 determination, as reflected in its April 7, 2022, letter to NEXT, constituted “final agency action” under the APA, 5 U.S.C. § 704. The Court concluded that the Corps’ determination met both prongs of the “final agency action” test: (1) the determination marked the consummation of the Corps’ decisionmaking process and (2) the determination had legal consequences.

As to the “consummation” prong, the Court rejected the Corps’ argument that the section 408 determination did not end the agency’s decisionmaking process “because NEXT must still obtain other permits before beginning construction,” including a Clean Water Act § 404 permit from the Corps. *Caswell*, 2025 WL 2256295, at *10–11. The Court stated that this argument “misidentifie[d] the agency action” being challenged in the case. *Id.* at *10. The Court held that “the Corps has made clear that there is no further decision-making *on the issue of Section 408*,” *id.* at *11 (emphasis added and footnote omitted), and that the determination thus “mark[ed] the consummation of [the Corps’] decision-making process regarding Section 408,” *id.*

As to the “legal consequences” prong, the Court reasoned that “the Corps ha[d], in essence, made a ‘no alteration’ determination.” *Id.* at *12.

“[A]s a practical matter, by determining that Section 408 does not apply to the ... [r]efinery, the Corps has stated that NEXT can use the [r]oad as a haul road without needing the Corps’ permission pursuant to Section 408. After making such determination, it is reasonable to

assume that the Corps would not then request criminal prosecution of NEXT for using the [r]oad as a haul road. ... Thus, ... the Corps' Section 408 determination carries with it the assurance of immunity and could release NEXT from criminal liability in a future proceeding.”

Id. (cleaned up). The Court also noted that the determination “allows the Section 404 permit process to proceed.” *Id.* The Court concluded these were both legal consequences.

Prudential Ripeness

Finally, the Court addressed the Corps' argument that the case should be dismissed a prudentially unripe. The Court concluded that delayed review could harm Columbia Riverkeeper, that adjudicating the case would not interfere with ongoing administrative action, and that there was no need for more factual development; accordingly, the Court declined to dismiss the case as unripe.

Subsequent Events

On September 29, 2025, the Corps filed an unopposed motion for a stay of the litigation to give it time to “reconsider” its section 408 determination.

Introduction

On July 1, 2025, the U.S. District Court for the District of Oregon Court granted environmental groups' motion to complete and/or supplement an administrative record filed by the United States Forest Service ("Forest Service") in a challenge to its approval of a forestry project, concluding the agency must have indirectly considered scientific articles referenced and hyperlinked in public comments on the project's draft Environmental Impact Statement ("EIS") that were not in the record.

Background

Plaintiffs Oregon Wild and WildEarth Guardians ("Oregon Wild" or "Plaintiffs") challenged the Forest Service's approval of the Youngs Rock Rigdon Project in the Upper Middle Fork Willamette Watershed (the "Project"). The Project was designed to improve stand and landscape diversity, reduce hazardous fuels, manage recreation, identify sustainable road systems, and provide forest products.

During the public comment period on the Project's draft EIS, Oregon Wild submitted a detailed 120-page comment extensively discussing the impacts of logging on climate, carbon emissions, and carbon storage. The comments cited and quoted scientific literature and included hyperlinks to access nine scientific articles (the "Exhibits"). The Forest Service issued a final EIS in March 2023 that included a response summarizing and addressing Oregon Wild's comments. The Forest Service issued a final Record of Decision approving the Project in December 2023.

Plaintiffs sued in June 2024, alleging violations of the National Environmental Policy Act and the Administrative Procedure Act ("APA"). The Forest Service filed its administrative record, which did not include the Exhibits. Plaintiffs moved to compel completion or supplementation of the record to include the Exhibits.

Legal Standard

Under the APA, judicial review of any agency decision is based on the "whole record," which consists of all documents and materials directly or indirectly considered by the agency in making its decision. *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989). There is a presumption that an agency's administrative record is complete, but it may be rebutted with "clear evidence" to the contrary. *Blue Mountains Biodiversity Project v. Jeffries*, 99 F.4th 438, 445 (9th Cir. 2024). The presumption may be overcome if a plaintiff can "(1) identify reasonable, non-speculative grounds for its belief that the documents were considered by the agency and not included in the record, and (2) identify the materials allegedly omitted from the record with sufficient specificity, as opposed to merely proffering broad categories of documents that are likely to exist." *Audubon*

***Oregon Wild v. Warnack*, No. 6:24-CV-00949-MTK, 2025 WL 1806613 (D. Or. July 1, 2025)**, summarized by David Samuels, Larkins Vacura Kayser LLP.

Soc’y of Portland v. Zinke, 2017 WL 6376464, at *4 (D. Or. Dec. 12, 2017) (cleaned up).

The Court’s Analysis

The Court found Plaintiffs had presented sufficient non-speculative grounds to rebut the presumption that the Forest Service’s administrative record was complete. The Exhibits were central to Oregon Wild’s comments, which contained extensive citation to and quotation from them, along with hyperlinks to access them. The Forest Service responded substantively to those comments, specifically summarizing and addressing the points made. The Court concluded that the Forest Service could not have responded to Oregon Wild’s comments without at least indirectly considering the Exhibits. Under Ninth Circuit precedent, documents “may not have literally passed before the eyes of the decision-makers” for them to have been indirectly considered. *In re United States*, 875 F.3d 1200, 1208 (9th Cir. 2017), *vacated on other grounds*, 583 U.S. 29 (2017).

In granting the motion, the Court rejected the Forest Service’s counterarguments. The agency argued that Plaintiffs’ position would make administrative records unworkably expansive by requiring inclusion of every document merely referenced in public comments. The Court disagreed, clarifying that it was not holding that *every* cited document must be included in the record, but rather that the specific nine documents at issue were sufficiently shown to have been indirectly before the agency decision-makers based on the particular facts of the case—including the extensive discussion, quotation, hyperlinks, and substantive agency response to the comments. The Court also distinguished cases cited by the Forest Service, noting the documents in them were either unavailable at the time of public comments or were not provided to the agency, requiring the agency to track them down. Here, by contrast, the Exhibits were provided via hyperlink in Oregon Wild’s comments and were therefore available to the agency.

Conclusion

The Court granted Plaintiffs’ motion to complete and/or supplement the administrative record. The decision provides important guidance on the scope of the administrative record when commenters extensively cite, quote, and provide hyperlinks to scientific literature. If the agency substantively responds to those comments, it may be said to have “indirectly considered” the cited materials, making them become part of the administrative record.

Oregon WaterWatch of Oregon v. Winchester Water Control District, No. 3:20-CV-01927-IM, 2025 WL 2418401 (D. Or. Aug. 21, 2025), summarized by Rebekah Dohrman, Dohrman Land Law, LLC.

Introduction

On August 21, 2025, the U.S. District Court for the District of Oregon found that Plaintiffs failed to establish by a preponderance of the evidence that Defendant is liable under the Endangered Species Act (ESA) for “take” of Oregon Coast coho salmon through Defendant’s operation of the Winchester Dam. The District Court’s decision is now on appeal to the Ninth Circuit Court of Appeals.

Background

Located on the North Umpqua River, and initially constructed in 1890 to generate electricity, the Winchester Dam (the Dam) now supports a reservoir that is recreationally used by members of the Winchester Water Control District (Defendant). Through a perpetual easement between Defendant and the Oregon Department of Fish and Wildlife (ODFW), the Dam also features a fish ladder that ODFW uses to count fish and for other fish hatchery-related uses.

Plaintiffs in this case include WaterWatch of Oregon, Pacific Coast Federation of Fishermen’s Associations, Institute for Fisheries Resources, and Steamboaters. Plaintiffs alleged that the Dam causes harm to Oregon Coast coho salmon, and Plaintiffs advocated for removal of the Dam. Plaintiffs argued that through Defendant’s operation of the Dam, Defendant was liable for “take” of the Oregon Coast coho salmon in violation of the ESA. Plaintiffs alleged that the journey of the coho salmon back to their spawning habitat requires that the fish navigate the Dam, and the Dam’s presence causes the death and injury of coho salmon and impedes their ability to successfully migrate and spawn upriver.

Procedural History

Plaintiffs sued Defendant, under Section 9 of the ESA, 16 U.S.C. Section 1538(a)(1)(B). The matter was stayed between January 1, 2022 and May 1, 2023 to allow Defendant to make planned repairs to the Dam. A 5-day bench trial took place in April 2025. Thereafter, in May 2025, the parties filed proposed findings of fact and conclusions of law.

Decision

The question before the Court is whether Plaintiffs have established by a preponderance of the evidence that Defendant is causing “take” of Oregon Coast coho salmon, a federally listed threatened species, in violation of the ESA. The Court explained that there are two elements of a take claim. First, the plaintiff must prove that the injury to identifiable members of the protected species is a type covered by the ESA. Second, the plaintiff must also prove that the relationship

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between the challenged activity and the injury meet the standards of proximate causation. The Court further explained that proximate cause requires a sufficient causal connection between the alleged irreparable harm and the activity to be enjoined such that the harm may be fairly traceable to the challenged action. Ultimately, after the Court made 142 findings of fact, it concluded that Plaintiffs did not present sufficient evidence to establish that the Defendant physically kills or injures coho salmon or significantly impairs their migration. The Court did find that the Dam may delay migrations of the coho salmon and may require that the salmon expend additional energy in navigating past the Dam. However, the Court concluded that a potential delay was not a “significant” impairment as required to prevail in an ESA “take” claim.

On September 29, 2025, Plaintiff filed an appeal with the 9th Circuit.