CASE NOTES

recent environmental cases and final rules

Environmental and Natural Resources Section OREGON STATE BAR
Editor: Micah Steinhilb July 2010

Editor's Note: This issue contains selected summaries of cases and administrative final rules issued in February, March, April and May 2010. Please contact me if you have any comments or suggestions about the newsletter, or would like to recommend a case or rule for inclusion in future issues. Thank you to all of the volunteer authors in this issue and to those who have signed up to write summaries for future newsletters. If you are interested in summarizing cases and rules for this newsletter, please contact me.

Regards,
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Certain Underwriters at Lloyd's London and Certain Excess Ins. Co., Ltd. v. Massachusetts Bonding and Ins. Co., et al., 235 Or. App. 99, 230 P.3d 103 (2010).

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Plaintiffs, Certain Underwriters of Lloyds London and Excess Insurance Company and Defendants, Massachusetts Bonding & Insurance Company and five other insurance companies, were all common insurers of Zidell. In the underlying action, Zidell sued Plaintiffs and Defendants after they refused to cover an action brought by the Department of Environmental Quality (DEQ) (DEQ Action). Defendants settled with Zidell and Plaintiffs were found liable for Zidell's DEQ Action litigation costs. Plaintiffs then sued Defendants for contribution. The trial court dismissed Plaintiffs' claims on summary judgment.

The Court of Appeals reversed in part, holding that the trial court erred in (1) finding that Defendants did not have a duty to defend Zidell, and that (2) Defendants' settlement with Zidell barred Defendants' claim for contribution. The Court of Appeals upheld the trial court's determination that (1) the statutory amendments to the Oregon Environmental Cleanup Assistance Act (OECAA) (ORS 465.475 - .480) did not bar Plaintiffs' contribution claim and that (2) Plaintiffs were not entitled to an award of attorney fees under ORS 742.061.

In reversing the trial court, the Court of Appeals held that Defendants had a duty to defend Zidell in the DEQ Action because DEQ's demand, warning Zidell about the ensuing DEQ cleanup action, constituted a "suit" within the meaning of the insurance policy and ORS 465.480(2)(b). The court found that the insurers should have known that liability could result from DEQ's initial letter for two reasons. First, because it was reasonable to read DEQ's letter as a warning that DEQ was not investigating whether contamination was present, but rather how much contamination had occurred. And second, DEQ's demand gave Zidell an ultimatum: investigate and remediate or have DEQ address the contamination.

Additionally, the court held that the settlement agreements did not extinguish Plaintiffs' contribution claims, because the right of contribution among insurers is based in equity, not on a subrogation or contract right where an insurer stands in the insured's shoes.

On the issue of the OECCA, upholding the trial court's ruling, the Court of Appeals held that the phrase "liable or potentially liable" in ORS 465.480(4) refers to persons from whom contribution can be *sought*, as opposed to (as Defendants argued) only persons from whom contribution can be *obtained*. The Court of Appeals also held that the 2003 amendments to OECCA expressly cut off contribution claims against settling insurers only in cases where a final judgment as to all insurers had not been entered before the enactment of the 2003 amendments. Because the final judgment in the underlying case had been entered before that effective date, Plaintiffs' contribution claim was not cut off.

Finally, the court held that Plaintiffs could not recover attorney fees from Defendants under ORS § 742.061, because the statute applies strictly to the insurer-insured relationship, not to a co-insurer relationship.

The Oregon Court of Appeals remanded the case for further proceedings.

Wirth v. Sierra Cascade, LLC, 234 Or. App. 740, 230 P.3d 29 (2010).

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In *Wirth*, the Oregon Court of Appeals reversed a summary judgment in favor of plaintiffs, the record owners of a mineral estate, declaring the extent of defendant's interest in that estate. Plaintiffs sought a declaration that defendant's mineral rights in a 28,000 acre parcel were limited to those set forth in a quit-claim deed to 180 acres of the property. Defendant counterclaimed, alleging an oral partnership agreement to develop the mineral rights to the entire 28,000-acre tract. Plaintiffs moved for summary judgment, contending that defendant's rights were limited by the quit-claim deed and that additional claims were barred by the statute of frauds and the parole evidence rule. The trial court granted the motion.

As noted, the Court of Appeals reversed, holding that genuine issues of material fact existed as to the creation of a partnership between the parties. The court first held that the enactment of ORS 67.055 in 1997 legislatively overruled long-standing precedent for determining whether a partnership exists. Under prior case law, the intent of the parties and their conduct in sharing profits and losses and exercising control of the business was decisive. ORS 67.055 replaced that inquiry with a non-exclusive list of factors to be considered. The sharing of profits creates a rebuttable presumption of partnership, while an agreement to share losses is no longer necessary to the creation of a partnership. The facts presented by defendant, including an affidavit from its principal and past statements by plaintiffs, created a question of fact as to the existence of an oral partnership.

The court then considered the statute of frauds, which bars evidence of an oral agreement to transfer real property. The court applied an historical exception to the statute: no writing is necessary for a partner to transfer his or her interest in land to a partnership created for the purpose of dealing in land. As to the parol evidence rule, the court held that questions of fact existed as to whether the quit-claim deed was a fully integrated writing or evidence of the partnership. The case was remanded to the circuit court for further proceedings.

U.S. v. Confederated Tribes of Colville Indian Reservation, 606 F.3d 698 (9th Cir. 2010).

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More than 150 years after a treaty set aside land near the modern town of Leavenworth, Washington for the Wenatshapam Fishery, and more than 50 years after the United States commenced litigation to define Indian treaty rights to fish, the 9th Circuit has recognized the fishing rights of the Wenatchi, a Constituent Tribe of the Confederated Tribes of the Colville Indian Reservation.

During the negotiation of the 1855 Yakama Treaty, fourteen tribes – including the Wenatchi Tribe – were consolidated as the Yakama Nation for purposes of the Treaty. Under the Treaty, the fourteen tribes gave up most of their lands in return for a specific reservation with set boundaries, and the right to continue taking fish at all usual and accustomed fishing areas. In addition, at the request of the Wenatchi leader, a second reservation was set aside for the

Wenatshapam Fishery on the Wenatshapam (now known as the Wenatchee) River, to be surveyed and marked out at some later date.

The second reservation was never created. In December, 1893, the United States began nearly a year of negotiations with the Yakama Nation to pay for the relinquishment of the right to the Wenatshapam Fishery reservation. The United States took the unusual step of stenographically recording the negotiations. Under the agreement reached in 1894, the Yakama Nation relinquished the right to land for the Wenatshapam Fishery reservation, but retained the right to fish there as a usual and accustomed fishing area. However, despite a promise in the 1894 Agreement to provide allotments to the members of the Wenatchi still living at the fishery, the United States never did so. Nonetheless, the Wenatchi remained and fished on their aboriginal lands until removed to the Colville Reservation in 1902 and 1903 as one of its Confederated tribes. Descendants of the Wenatchi have continued to this day to fish at the Wenatshapam Fishery.

Relying on the 1894 Agreement, the expert testimony of anthropologists, transcripts of the 1893 and 1894 negotiations, and letters from that era, the district court concluded that the United States and the Yakama Nation agreed in 1894 that the Wenatchi would retain the right to fish at the Wenatshapam Fishery, as consideration for the Yakama Nation's sale of the reservation. The 9th Circuit affirmed, concluding, however, that the Wenatchi's right was non-exclusive, to be exercised in common with the Yakama Nation.

Fence Creek Cattle Co. v. U.S. Forest Service, 602 F.3d 1125 (9th Cir. 2010).

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The Forest Service cancelled Fence Creek Cattle Co.'s permission to use two grazing allotments for failure to comply with terms and conditions of the permit in 2005. Fence Creek unsuccessfully sought administrative review of the decision. Fence Creek then sued the Forest Service in the United States District Court for the District of Oregon. Fence Creek alleged the Forest Service violated the APA by making an arbitrary and capricious decision and failed to provide due process. The district court upheld the decision of the Forest Service and Fence Creek appealed.

The case began when the Forest Service began investigating the ownership of cattle seen grazing on the allotments in Oregon's Wallowa-Whitman National Forest. The Forest Service requested documentation, including proof of ownership of cattle, from Fence Creek in 2005. At about this same time, the joint venture behind Fence Creek fractured. Accordingly, Fence Creek no longer owned the cattle that it had originally intended to graze on federal lands. In December 2005, the Forest Service notified Fence Creek that it was cancelling the permit for two allotments.

On review, the 9th Circuit upheld the lower court and Forest Service decisions. The 9th Circuit refused Fence Creek's request to expand the administrative record, finding that Fence Creek failed to show that supplementation of the record was necessary. The court held that the

[1] The views in the article are the author's alone and do not necessarily represent those of the Office of the Solicitor, the Department of the Interior, or the United States.

decision to cancel the grazing permit for one allotment for failure to comply with terms and conditions was proper based on the record evidence that Fence Creek allowed livestock that it did not own to graze on the allotment. Because the Forest Service decision was fully supported by this fact alone, the court chose not to review Fence Creek's argument related to the Forest Service's alleged failure to prove a knowing or willful false statement. Similarly, the court held that the Forest Service's decision to cancel the grazing permit for another allotment due to failure to comply with eligibility requirements was adequately supported by evidence in the record. The court held that the Forest Service's decision complied with the APA's requirement to give notice and an opportunity to demonstrate compliance prior to a suspension or revocation.

U.S. v. Bell, 602 F.3d 1074 (9th Cir. 2010).
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This case represents the latest installment in a long history of litigation in Nevada over the waters of the Truckee and Carson Rivers and the decline of Pyramid Lake. It was brought by the United States against the Truckee-Carson Irrigation District ("TCID"), its board members, and all water users in the project under TCID's management in an effort to recoup excess diversions TCID permitted over a period of many years. The Pyramid Lake Paiute Tribe ("Tribe") intervened as a plaintiff. Here, the Ninth Circuit Court of Appeals reviewed a decision by the Nevada district court involving the interpretation of a statute enacted by Congress in 1990 to resolve the ongoing dispute between the Tribe and TCID: the Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act ("Settlement Act"). The Ninth Circuit resolved several issues under the Settlement Act, three of which are highlighted below.

First, the court held that the Settlement Act allows the government to recoup excess diversions for past violations of OCAPs—operating criteria and procedures—limiting the maximum diversions from the two rivers. TCID had argued that the Settlement Act was only forward looking, a position the court rejected as contrary to the stated purpose of the Act, namely, to remedy past violations.

Second, the court held that even if there is not enough water to both satisfy the requirements of TCID to supply farmers with water and to restore Pyramid Lake, the district court's decision allowing recoupment of water does not conflict with the orders establishing the amount of water that could be diverted from the rivers for agricultural purposes. Instead, the court placed the burden on TCID to make a good faith effort to maximize its supply of water to meet the competing demands.

Third, the court vacated and remanded the district court's decision on a novel issue, namely that TCID must pay post-judgment interest (which judgment ordered the return of water, not money) in water in the amount of two percent per year on the outstanding balance of water due. The Ninth Circuit's decision was based on the fact that the district court had not explained its factual basis for this type of award and it was without precedent in the lower courts.

U.S. v. Orr Water Ditch Co., 600 F.3d 1152 (9th Cir. 2010).
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In *United States v. Orr Water Ditch Co.*, the Ninth Circuit Court of Appeals addressed two separate issues: the extent of the federal courts' subject matter jurisdiction over appeals of decisions relating to water rights adjudicated on the Orr Ditch Decree ("Decree") for the Truckee River; and whether or not the Decree protects the Pyramid Lake Paiute Tribe of Indians' water rights granted under the Decree from allocations that would adversely affect its water rights. According to the Decree, the Pyramid Lake Tribe owns the two most senior water rights on the Truckee River. The Nevada State Engineer had previously granted the Tribe the right to all water remaining in the river after the Decree rights and other rights were satisfied. However, in June of 2007, the State Engineer granted several new groundwater applications within a portion of the Truckee River. In granting the new applications, the Engineer determined that the Tribe's water rights could be diminished by groundwater allocations without violating the Decree.

The Tribe appealed the Engineer's ruling to the federal district court, arguing that the court had jurisdiction to review the ruling as it affected rights under the Decree and that the new groundwater applications had an adverse impact on Tribe's decreed water rights.
In determining whether or not the Decree permits an allocation of groundwater that has an adverse impact on the Tribe's water rights, the court examined the language of the Decree. The court stated that while there is no explicit language about groundwater, the water rights granted to the Tribe under the Decree were intended to fulfill the purpose of reserving "a reasonable amount of water" for use on the reservation. Further, based on the hydraulic connection between the ground water and surface water, the court determined that it would be inconsistent with that purpose to allocate water to other users that would diminish the Tribe's supply. Based on this determination the court held that the Decree protects the Tribe's water rights from allocations that would adversely affect its senior water rights.

Regarding whether the district court has subject matter jurisdiction over the appeal from the Engineer's ruling, the court determined that jurisdiction was proper. The court explained that its jurisdiction is based on the recognized principal of law set out in *U.S. v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 858 (9th Cir. 1983), *cert. den.*, 464 U.S. 864 (1983) and acknowledged by Nevada state law. This principal recognizes that when a court enters the original decree for a stream system, it has jurisdiction over the appeal of decisions under that decree. The court was careful to limit this holding to decisions based on a court decree and not to decisions of the state Engineer based on state law. Ultimately the court held that the district court has subject matter jurisdiction to hear the Tribe's appeal from the State Engineer's ruling under the Decree.

Native Ecosystems Council v. Tidwell, 599 F.3d 926 (9th Cir. 2010).
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The Forest Service issued an Environmental Assessment (EA) that found no significant environmental impact (and thus no need to prepare an Environmental Impact Statement) from a decision to update grazing allotments in a portion of the Beaverhead-Deerlodge National Forest

in southwest Montana. Because the proposed project area consists primarily of open, mountain sagebrush and grasslands, the Forest Service selected sage grouse as the "indicator" species—that is, since sage grouse inhabit the same habitat as other species, evaluation of the impacts to sage grouse should provide a reasonably accurate analysis of the impacts to the other species also. However, because the Forest Service could not actually document any sage grouse in the project area, the Forest Service elected instead to evaluate the impact to sage grouse ***habitat***, rather than to sage grouse populations themselves, on the theory that impacts to habitat would give a reasonably accurate estimate of impacts to the birds themselves.

The 9th Circuit appeals court held, however, that this "proxy-on-proxy" analysis, whereby sage grouse habitat is used as a proxy for sage grouse populations, which, in turn, are used as a proxy for populations of other species, was not an accurate and reliable methodology when, in fact, sage grouse could not be proven to even inhabit the area. The court reversed and remanded the Forest Service decision, stating that it did not comply with the National Forest Management Act (NFMA) requirement to ensure viable populations of ***existing*** species. In addition, the court held that the decision was also arbitrary and capricious because it "failed to consider an important aspect of the problem," namely, why sage grouse were apparently not currently using the sage brush habitat and whether that would change with a change in grazing policies. The court found it remarkable that the Forest Service had purportedly relied on data and statements in a biologist's report but had come to different conclusions than did the report itself.

Moreover, the court held that the Forest Service's selection of a non-existent indicator species (sage grouse) to evaluate the proposed project's impact on the diversity of all sagebrush species also meant that the EA did not take the requisite "hard look" required by NEPA. Thus the court reversed and remanded the Forest Service decision under both NFMA and NEPA.

MacClarence v. EPA, 596 F.3d 1123 (9th Cir. 2010).
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Under Title V of the Clean Air Act, facilities that are “major sources” of pollutants must obtain state permits that include emission limitations and monitoring requirements. Permits are subject to public notice and comment requirements and EPA review. 42 U.S.C. § 7661d; 40 C.F.R. § 70.8(d). If EPA does not object to the permit, any person may petition EPA to object based on objections made during the public comment period.

Bill MacClarence asked EPA to object to issuance by the Alaska Department of Environmental Conservation (ADEC) of a Title V permit to BP Exploration (Alaska) Inc. for polluting activities at Gathering Center #1 (GC1), a Prudhoe Bay oil and gas processing facility owned by BP. EPA declined, and MacClarance petitioned the Ninth Circuit for review. MacClarence’s argument was that ADEC and EPA had failed to aggregate GC1 with other stationary sources of pollution, since together they formed a “group of stationary sources” within the meaning of 40 C.F.R. § 70.2. MacClarence wanted all BP units in the Prudhoe Bay Facility to be aggregated so that the Title V permit applied to the whole, rather than just to GC1. BP, naturally, wanted no aggregation conditions in the permit. ADEC aggregated GC 1 with some but not all other facilities. ADEC explained it rejected fuller aggregation because (1) it would stretch the “concept of proximity”; (2) the complexity of administering such a large aggregation

of sources without a clear environmental benefit; and (3) lack of precedent for such a large aggregation.

On petition for review, the Ninth Circuit did not decide the merits of MacClarence's aggregation arguments. It merely upheld EPA's finding that MacClarence failed to demonstrate under 42 U.S.C. § 7661d(b)(2) that the final Title V permit for GC1 violated the CAA. Thus, the main thrust of the case is the burden on the objector, MacClarence. EPA found MacClarence failed to provide adequate evidence to support his claim for greater aggregation of sources. The Ninth Circuit found EPA's construction of MacClarence's burden to support his allegations with "legal reasoning, evidence, and references" to be both reasonable and persuasive.

Revisions to the General Conformity Regulations; Final Rule, 75 Fed. Reg. 17,253 (April 5, 2010) (to be codified at 40 C.F.R. pts. 51, 93), *available at* *http://edocket.access.gpo.gov/2010/pdf/2010-7047.pdf*.

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The Environmental Protection Agency recently released a final rule relating to General Conformity regulations under the Clean Air Act (CAA). These requirements, required by 42 U.S.C. § 7506, require that proposed Federal agency actions conform to the applicable State Implementation Plan (SIP), Tribal Implementation Plain (TIP), or Federal Implementation Plain (FIP) for attaining and maintaining National Ambient Air Quality Standards (NAAQS). The final rule amends General Conformity to help ensure federal actions do not cause or contribute to a NAAQS violation or interfere with the purposes of a SIP, TIP, or FIP. The Final Rule goes into effect on July 6, 2010.

Currently, the General Conformity regulations require a three-step process. First the agency must determine if the General Conformity requirements apply. If the agency determines the General Conformity regulations apply, the agency will conduct a conformity determination, and finally, will allow a public review process including a thirty day comment period.

The revised regulations make several changes. The new rule eliminates 40 CFR part 51, Subpart W §§ 51.850-51.860. The agency determined these sections were unnecessarily duplicative of 40 CFR Part 93. EPA left 40 CFR Part 51.181 and amended the text to make it clear that any state or tribe submitting a General Conformity SIP or TIP that it must be consistent with 40 CFR Part 93.

The final rule also revises several sections of 40 CFR part 93 to, among other things, clarify the process, delete outdated/unnecessary requirements, authorize innovative and flexible approaches, reduce paperwork, provide transition tools for implementing new standards, address issues identified by implementing agencies, and provide a better explanation of regulations and policies. Among other things, the Final Rule adds provisions permitting facility-wide approaches to limit emissions in accordance with the applicable implementation program; incorporate the use of early emission reduction credits; allow (under certain criteria) the emission of one precursor of a criteria pollutant to be mitigated; and allow alternate schedules for mitigating emissions increases. The agency removed provisions relating to the *de minimis* emissions analysis in the conformity review, adding new types of actions that may be included as "presumed to conform" and exempting certain emissions from stationary sources permitted under the minor source New Source Review programs. Finally, the agency added, revised or

eliminated a number of definitions, added requirements for the implementation of grace periods for new nonattainment areas, added additional alternative methods to demonstrate conformity for time periods beyond those covered by SIP and/or TIP to include enforceable commitments in the SIP/TIP to address future emissions from federal actions.

Regulation of Fuels and Fuel Additives; Changes to the Renewable Fuels Standards, 75 Fed Reg 14,669 (March 26, 2010) (to be codified at 40 C.F.R. pt. 80), *available at* *http://edocket.access.gpo.gov/2010/pdf/2010-3851.pdf*.

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This spring, EPA finalized revisions to the National Renewable Fuel Standard (RFS) program to implement the new requirements of the Energy Independence and Security Act of 2007 (EISA). EISA required significant changes to both the structure and volume of the program, which was originally implemented under the Energy Policy Act of 2005 (EPAct).

Background:

Congress established the RFS program in 2005 to mandate a minimum annual volume of renewable fuel used by the transportation sector. The EPAct and associated regulations (RFS1) initially required the use of 4 billion gallons of renewable fuel in 2006, increasing to 7.5 billion gallons in 2012. RFS1 also required that 250 million gallons of renewable fuel be derived from cellulosic biomass (e.g. switchgrass, wood chips, grass and tree cuttings, and other woody sources of fuel).

EISA's program (RFS2), increased the renewable fuel mandate to 36 billion gallons by 2022 (a five-fold increase). RFS2 also established four separate categories of renewable fuels (renewable fuel, advanced biofuel, biomass-based diesel, and cellulosic biofuel), each with its own annual volume mandate and specified life cycle greenhouse gas emissions threshold. Notably, cellulosic biofuel received the greatest mandate increase: 16 billion gallons by 2022.

Rule Highlights:

Among other changes, the final RFS2 rule makes the following major changes to the program:

- Substantially increases renewable fuel volumes and expands the volume "ramp-up" timeframe through at least 2022;
- Divides total renewable fuel requirements/volumes into four separate categories: renewable fuel, advanced biofuel, biomass-based diesel, and cellulosic biofuel;
- Requires each fuel category to achieve certain minimum thresholds of GHG emission performance over its life cycle;
- Requires all "renewable fuel" to be made from feedstocks that meet a new definition of renewable biomass, including certain land use restrictions.

Significantly, RFS2 now requires that the lifecycle GHG emissions of a qualifying renewable fuel (including all stages of fuel and feedstock production, distribution and use by the

ultimate consumer) must be less than the lifecycle GHG emissions of the 2005 baseline average gasoline or diesel fuel that it replaces. The lifecycle requirements are: 20% reduction for renewable fuel, 50% reduction for both advanced biofuel and biomass-based diesel, and 60% reduction for cellulosic biofuel. Fuel from current facilities and all new facilities built prior to December 19, 2007 are exempt from the 20% lifecycle requirement for the "renewable fuel" category.

EPA expects that by 2022, the increased volume mandates under RFS2 will decrease GHG emissions by 138 million metric tons (equivalent to removing 27 million vehicles from the road). The final rule is effective on July 1, 2010. The percentage standards apply to all gasoline and diesel produced or imported in 2010.