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A special thank you to our talented contributors for their summaries: Oliver Stiefel of Crag Law Center, Kathryn McIntosh of Lewis & Clark Law School, Amelia Schlusser of the Green Energy Institute, Jeanette Schuster of Tonkon Torp LLP, Chris Thomas of The Freshwater Trust, and Cody Gregg of Willamette University Law School. If you are interested in summarizing cases or rules, please contact me.

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- ***Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.***, No. 3:01-cv-00640-SI, 2016 WL 2353647, --- F.Supp.3d --- (D. Or. May 4, 2016)
- ***Oregon Wild v. U.S. Forest Service***, No. 1:15-cv-00895-CL, 2016 WL 3411554, --- F.Supp.3d ---- (D. Or. June 17, 2017)

A. 9th Circuit Court of Appeals

1. ***Idaho Conservation League v. Bonneville Power Administration*****,** --- F.3d ---, No. 12-70338, 2016 U.S. App. LEXIS 11175, 2016 WL 3430538 (9th Cir. June 21, 2016). *Author:* Oliver Stiefel, Crag Law Center.

In 2011, the Bonneville Power Administration ("BPA") and the Army Corps of Engineers ("Corps") decided to change winter operations for the Albeni Falls Dam on the Pend Oreille River. When water is released from the dam's reservoir to generate electricity, it decreases the reservoir's depth and causes the shoreline to recede. Plaintiffs-Appellants Idaho Conservation League ("ICL") challenged BPA's failure to prepare an Environmental Impact Statement ("EIS")—as opposed to a less thorough Environmental Assessment ("EA")—on the plan for "flexible winter power operations." In a unanimous opinion authored by Judge Kozinski, the Ninth Circuit held that an EIS was not required.

The National Environmental Policy Act ("NEPA") requires all federal agencies to prepare an EIS for all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). An EA is meant to document the agency's determination whether an EIS is required. 40 C.F.R. § 1508.9. The Ninth Circuit noted that an EIS is required only when a proposed action is "major." The court cited a previous case, *Upper Snake River Chapter of Trout Unlimited v. Hodel*, 921 F.2d 232, 234–35 (9th Cir. 1990), for the proposition that when an agency, responding to changing conditions, makes a decision to operate a completed facility within the range originally available to it, the action is not major. According to the court, where a proposed federal action would not change the status quo, an EIS is not necessary.

Here, the Ninth Circuit queried whether the agencies had consistently fluctuated winter reservoir levels; if so, formalizing that approach would not be a major federal action because the agencies would not be changing the status quo. Prior to 1997, BPA and the Corps had consistently fluctuated winter reservoir levels. During the period from 1997 to 2011, the agencies began to hold the reservoir's level constant, in response to concerns over impacts to the kokanee salmon population. The court thus considered whether the approach of holding reservoir levels constant from 1997 to 2011 changed the status quo; if not, then reverting to the previous regime didn't change the status quo either.

First, the court found that the practice of holding reservoir levels constant originally began as a three-year test, a proposal that the Corps considered in a 1995 EA. The court noted that this was merely a short-term decision that did not change the status quo; because it was not a significant or long-term change in operating policy, it did not constitute a major federal action. Next, the court found that while the agencies ultimately chose to carry forward this practice, they retained the discretion they always had to respond annually to changing conditions. Therefore, because the 1997 to 2011 period when the agencies held winter lake levels constant did not change the operational status quo, neither did the decision to revert to flexible winter operations.

The court thus held that EIS was not required because the agencies were doing nothing

new, nor more extensive, nor other than that contemplated when the project was first operational. On a related point, the court clarified that the continued operation of the dam was not itself a major federal action requiring an EIS because agencies are not required to prepare an EIS every time they take an action consistent with past conduct.

ICL also challenged the EA's conclusion that flexible winter operations would have only an incremental impact on the spread of flowering rush, an invasive species discovered around the reservoir in 2008. The court held that this claim was moot, as were ICL's other challenges to the EA's finding of no significant impact, because the decision adopting flexible winter operations did not trigger NEPA's requirement to publish an EIS.

Finally, the court declined to consider ICL's claim that the BPA arbitrarily limited its analysis of flowering rush impacts. While the court noted that ICL may well have a colorable claim that analysis of how flexible winter operations specifically, as opposed to year-round dam operations generally, might affect the spread of the invasive species, ICL had only mentioned in a footnote that BPA might need to prepare a supplemental NEPA analysis. Because the court does not ordinarily consider matters on appeal that are not specifically and distinctly argued, including those raised in a footnote, the court held that the supplemental NEPA question was outside the scope of the case.

2. **Jamul Action Committee v. Chaudhuri**, No. 15-16021, 2016 WL 3910597, --- F.3d --- (9th Cir. June 9, 2016). *Author*: Kathryn McIntosh of Lewis & Clark Law School.

This case concerns an Indian gaming casino in Jamul, California, and the members of the Jamul Indian Village community that oppose its creation. Plaintiffs, a number of individuals and organizations that include the Jamul Action Committee, the Jamul Community Church, and four residents, collectively JAC, challenged the building of the casino by the Jamul Indian Village. JAC argued that the National Indian Gaming Commission (NIGC) violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321- 4370h, by approving the gaming ordinance without first conducting a NEPA environmental review. JAC petitioned the district court for a writ of mandamus under the Administrative Procedure Act ("APA"), arguing the failure to perform a NEPA review was "agency action unlawfully withheld." 5 U.S.C. § 706(1). The district court denied the petition and held, in part, NIGC's approval of the gaming ordinance was not major federal action and did not trigger NEPA. The Ninth Circuit affirmed that decision on alternative grounds.

Two federal statutes are at issue in this case: the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721, and NEPA. The IGRA regulates gaming on Indian lands and divides gaming activities into classes. Class III gaming, at issue here, and the IGRA requires Indian tribes to receive an approved gaming ordinance from the NIGC for class III gaming on Indian land. The NIGC is to approve a gaming ordinance meeting the IGRA requirements no later than ninety days after the ordinance was submitted. 25 U.S.C. § 2710(e). A gaming ordinance is considered approved, to the extent the ordinance is consistent with the IGRA, if the NIGC has not acted on the proposed ordinance by the end of the ninety-day period.

NEPA imposes certain procedures requiring federal agencies to take a 'hard look' at the environmental consequences of major federal action. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). These procedures work to ensure the public receives information before decisions are made and agency action is taken. Agencies performing major federal action are required to prepare an environmental impact statement ("EIS") to review the proposed action. This procedural requirement applies unless the applicable existing laws make full compliance with one of the directives impossible. *Jones v. Gordon*, 792 F.2d 821, 826 (9th Cir. 1986).

On appeal, JAC argued that NEPA requires NIGC to comply with the statute's environmental review requirement before approving the gaming ordinance and that failure to do so resulted in agency action unlawfully withheld. The Ninth Circuit disagreed and determined that even if NIGC's approval of the gaming ordinance was major federal action under NEPA, NIGC was not required to prepare an EIS because an irreconcilable statutory conflict existed between NEPA and IGRA.

Previously, the Ninth Circuit has recognized circumstances where an agency did not need to complete an EIS even when there was major federal action and no statutory exemption. Like the issue here, the court stated, an agency is not required to comply with NEPA when the result would create an irreconcilable and fundamental conflict with the substantive statute at issue. *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 648 (9th Cir. 2014). Such a conflict exists if a statute sets a fixed time period for the implementation of a decision and the time period is too short for the agency to comply with NEPA. *Flint Ridge Development Co. v Scenic Rivers Ass'n of Ok.*26 U.S. 776, 791 (1976).

Here, Congress enacted statutory deadlines in the IGRA requiring the NIGC to approve a gaming ordinance no later than ninety days after it was submitted for review. The Ninth Circuit determined it would be impossible for the NIGC to prepare an EIS within the ninety-day window required for approving the ordinance. The court reasoned because of the time requirements set in publishing a final EIS – notice in the Federal Register of intent to prepare an EIS, scoping, preparing a draft EIS and publishing it in the Federal Register, providing the public opportunity to comment, preparing the final EIS, and prepare and issue a record of decision – it would be impossible for the NIGC to comply within the IGRA's timeframe. The court concluded an irreconcilable statutory conflict existed between the deadline set in the IGRA and NEPA, and held that the NIGC's approval of the ordinance without conducting an environmental review did not violate its obligations under NEPA.

3. ***Oregon National Desert Association v. Jewell***, No. 13-36078, 2016 WL 3033674, --- F.3d --- (9th Cir. 2016). *Author*: Amelia Schlusser of the Green Energy Institute.

The Bureau of Land Management ("BLM") issued a Final Environmental Impact Statement ("FEIS") and a Record of Decision ("ROD") approving the development of the Echanis wind energy project on private land in Harney County, Oregon, and the issuance of a right-of-way for associated transmission infrastructure that would cut across the Steens Mountain Cooperative Management and Protection Area. The Oregon National Desert Association ("ONDA") challenged the project, alleging that BLM failed to comply with the National

Environmental Policy Act ("NEPA") because the FEIS and ROD did not adequately address the project's impacts to the greater sage grouse.

The district court granted defendants' motion for summary judgment. The Ninth Circuit reversed the district court's entry of summary judgment in part, but declined to review the plaintiffs' argument regarding "genetic connectivity" because it concluded that ONDA had failed to raise its concerns on this issue during the environmental review process.

ONDA first argued that the environmental review of the project violated NEPA because BLM failed to directly evaluate baseline winter conditions at the Echanis site. Instead, BLM extrapolated winter data from nearby sites and concluded in the FEIS that there was no sage grouse winter habitat at the Echanis site. The court agreed with ONDA and held that BLM violated NEPA when it failed to conduct an accurate scientific analysis and based its assumptions on inaccurate data.

The court rejected BLM's assertion that its scientific analysis was entitled to deference, because NEPA requires BLM to "ensure the accuracy and scientific integrity" of its environmental analysis. The court further explained that it is not impermissible for an agency to extrapolate habitat data from one site to another during NEPA review, so long as such extrapolation is "based on accurate information and defensible reasoning." In this case, however, BLM applied inaccurate data. The FEIS stated that no sage grouse were found at a nearby site during winter months, while the habitat survey BLM relied upon actually recorded four sage grouse at the site in February. Because BLM based its analysis on inaccurate data, the court concluded that BLM's assumption that no sage grouse were present at the Echanis site during winter months was arbitrary and capricious.

ONDA also challenged BLM's environmental review of the Echanis project on the grounds that the FEIS failed to address genetic connectivity between sage grouse populations. BLM countered that ONDA had failed to exhaust this argument during the administrative process, and therefore this challenge should not be entitled to judicial review under NEPA. The court agreed with BLM and held that ONDA had failed to exhaust its administrative remedies during the NEPA review process.

The court concluded that ONDA had failed to use the term "genetic connectivity" in its comments on BLM's draft EIS. While ONDA's comments on the draft EIS had addressed general habitat connectivity and fragmentation concerns, the court determined that these statements were too vague to alert BLM to ONDA's specific concern regarding *genetic* connectivity between separate sage grouse populations. The court therefore held that ONDA's challenge regarding genetic connectivity was not entitled to judicial review.

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4. ***Protect Our Communities Foundation v. Jewell***, Nos. 14-55666 and 14-55842, 2016 WL 3165630, --- F.3d --- (9th Cir. 2016). *Author:* Amelia Schlusser of the Green Energy Institute.

The Bureau of Land Management ("BLM") granted Tule Wind, LLC ("Tule") a right-of-way to build and operate a wind energy project on federal lands in San Diego County. Protect Our Communities Foundation and others challenged BLM's issuance of the right-of-way, alleging that BLM failed to comply with the National Environmental Policy Act ("NEPA") in preparing an Environmental Impact Statement ("EIS") for the project and that the wind project would harm birds in violation of the Migratory Bird Treaty Act ("MBTA") and the Bald and Golden Eagle Protection Act ("BGEPA"). The district court granted defendants' motion for summary judgment on all claims, holding that the final EIS sufficiently complied with NEPA and that BLM was not obligated to ensure that it or Tule obtained permits under the MBTA or BGEPA prior to issuing the right-of-way. The Ninth Circuit affirmed the district court's decision.

Plaintiffs' primary challenges to BLM's issuance of the right-of-way alleged that the project's EIS failed to comply with NEPA. Plaintiffs asserted that first, the EIS's statement of purpose and need was too narrow; second, the EIS failed to adequately consider viable alternatives to the project; third, the proposed mitigation strategies were too vague and speculative; and fourth, the EIS failed to take a "hard look" at the project's potential environmental impacts.

In response to plaintiffs' first, second, and third NEPA arguments, the court first found that the EIS's purpose and need statement adequately reflected both BLM's immediate objective to respond to Tule's right-of-way request, and BLM's broader policy objectives, including the goal to approve new renewable energy development on public lands. Next, the court concluded that BLM had examined all "reasonable and feasible alternatives" when it considered five action, no-action, and design alternatives. The court further held that BLM's rejection of a distributed generation alternative advocated for by the plaintiffs was entitled to deference because it constituted a "technical determination" reflecting BLM's "specialized expertise." Finally, the court found that the "comprehensive" mitigation measures outlined in the EIS and those required by an accompanying Project-Specific Avian and Bat Protection Plan provided sufficient detail to comply with NEPA's requirements.

Plaintiffs' fourth and final NEPA claim raised four additional challenges to BLM's evaluation of the project's environmental impacts. First, plaintiffs argued that BLM failed to review the effects of the project's noise on birds at all life stages and that BLM failed to conduct nighttime surveys to estimate how many migratory birds might collide with the wind turbines. The court rejected these arguments, finding that BLM took the requisite "hard look" at these impacts by outlining more than a dozen noise-mitigation measures, reviewing existing studies and scientific literature on nighttime avian activity in the area, and choosing to reposition turbines in valleys rather than ridgelines to reduce risk to nocturnal migrants.

Next, plaintiffs argued that BLM failed to adequately evaluate the human health impacts of inaudible noise, electromagnetic fields, and stray voltage from the project. The court concluded that BLM had properly reviewed the available scientific literature on these impacts

and had engaged in "reasoned analyses" of these risks, and that BLM's discretionary judgment was entitled to deference. Finally, plaintiffs argued that the EIS failed to take a "hard look" at the project's greenhouse gas (GHG) emissions. The court, however, found that BLM acted reasonably in determining that the project's GHG emissions would not be significant enough to warrant further analysis and that renewable energy generated by the project would offset total GHG emissions.

Plaintiffs also argued that BLM's issuance of a right-of-way violated the MBTA and the BGEPA because the wind project might unlawfully "take" birds protected under these Acts. First, plaintiffs argued that by granting a permit to Tule, BLM would be directly liable for any unlawful "takes" committed by Tule's project in the future. Second, plaintiffs argued that BLM's right-of-way authorization was "not in accordance with law" in violation of the Administrative Procedures Act (APA) because it did not first require Tule to obtain permits from the Fish and Wildlife Service.

The court rejected plaintiffs' arguments under the MBTA and BGEPA. The court held that the MBTA does place liability on agencies such as the BLM that are acting in a "purely regulatory capacity," and when such actions "do not directly or proximately cause the 'take' of migratory birds." Similarly, according to the court, an agency does not violate the APA when it authorizes a third party to engage in a lawful activity merely because the third party may subsequently engage in unlawful activity.

5. ***Whittaker Corp. v. United States***, No. 14-55385, 2016 WL 3244838, ---F3d.--- (9th Cir. June 13, 2016). *Author*: Jeanette Schuster of Tonkon Torp LLP.

This case examines the interplay between the two different and distinct methods available to potentially responsible parties ("PRPs") under CERCLA to recover all or a portion of their environmental response costs—cost recovery claims under CERCLA Section 107(a) and contribution claims under CERCLA Section 113(f). Cost recovery is available to PRPs for costs "voluntarily" incurred to respond to environmental contamination, while contribution claims are available to PRPs during or after being sued for cost recovery under Section 107(a) or after a PRP has settled its CERCLA liability with the government. The distinction is often key, as it was here, because cost recovery claims have a longer statute of limitations period than contribution claims (six years and three years, respectively).

In this case, the Ninth Circuit reviewed the district court's dismissal of Whittaker's lawsuit brought against the United States government under CERCLA to recover the costs Whittaker had incurred to investigate and clean up environmental contamination at its munitions facility in Santa Clarita, California (the "Bermite Site"). Whittaker is a defense contractor that manufactures and tests munitions for the United States military. It acquired the Bermite Site in 1967 and operated it until 1987. In 2000, Whittaker was sued by the Castaic Lake Water Agency and other water providers under CERCLA for contamination (perchlorate primarily) to the plaintiffs' water supplies from the Bermite Site. In 2003, the district court in that litigation granted summary judgment to the Castaic Lake plaintiffs and, in 2007, Whittaker and its insurers settled the case. Of importance to the Ninth Circuit in this case was the fact that the Castaic Lake litigation made Whittaker liable for a specific set of plaintiffs' costs—the costs to remove

perchlorate contamination from the water wells and the costs to purchase replacement water—but did not require Whittaker to clean up the Bermite Site.

In 2013, Whittaker initiated this CERCLA lawsuit against the United States seeking to recover Whittaker's costs to investigate and clean up the Bermite Site, which were separate and distinct from the costs it incurred in connection with the Castaic Lake litigation. The district court did not appreciate this distinction and dismissed Whittaker's case, holding that Whittaker was limited to a contribution claim under CERCLA Section 113(f) because of the Castaic Lake litigation and that the statute of limitations for a contribution claim had lapsed.

The Ninth Circuit reversed and remanded. It rejected the government's claim that once the procedural/statutory triggers for a party's contribution claim under CERCLA Section 113(f) have occurred, the party's right (or requirement) to seek contribution from other PRPs extends to all of the party's expenses at the site, not just those that are the subject of the proceeding that triggered the initial contribution remedy. Instead, the Ninth Circuit recognized separate rights of action under CERCLA for separate sets of environmental expenses, and thus separate sets of triggers for statute of limitations purposes. Because in its case against the United States Whittaker sought recovery of costs that were separate from the Castaic Lake litigation, the Ninth Circuit held that Whittaker was not required to bring its suit as a claim for contribution and was therefore not barred from bringing a cost recovery action against the United States.

B. District of Oregon

1. ***Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.***, No. 3:01-cv-00640-SI, 2016 WL 2353647, --- F.Supp.3d --- (D. Or. May 4, 2016). *Author*: Chris Thomas, Staff Attorney for The Freshwater Trust.

In May the District Court for the District of Oregon ruled on a motion for summary judgment in the ongoing case concerning Endangered Species Act ("ESA") compliance for the Federal Columbia River Power System ("FCRPS"). The court also ruled on National Environmental Policy Act ("NEPA") compliance issues related to ESA mitigation obligations. While of utmost importance the Columbia and Snake River salmon recovery, this decision has additional importance as it highlights the shifting landscape of ESA compliance in an era of increasing environmental uncertainty resulting from climate change.

Judge Michael Simon's opinion is the most recent decision in a long line of challenges to numerous iterations of the biological opinion ("BiOp") issued by NOAA Fisheries for the FCRPS. This conflict has spanned more than 20 years since the first Snake River salmon population was listed under the ESA in 1991. In that time, 13 species of salmonids throughout the Columbia and Snake River Basins have been listed under the ESA as either threatened or endangered. Despite the listings and the protections associated with such designations, the vast majority of those populations remain in a "highly precarious state."

The Plaintiffs challenged the 2014 BiOp—the result of Judge James Reddin's 2011 judicial opinion invalidating the previous BiOp—as violating the ESA and the Administrative Procedure Act. The Plaintiffs also advanced a new claim in this longstanding conflict. They

argued that the U.S. Army Corps of Engineers ("Corps") and Bureau of Reclamation ("Reclamation") violated NEPA by failing to prepare an environmental impact statement ("EIS") for the 73 reasonable and prudent alternatives ("RPAs") contained in the BiOp.

The court, in ruling on the cross-motions for summary judgment, faced two core questions. First, did NOAA act arbitrarily and capriciously in concluding that the FCRPS does not violate the ESA's no jeopardy requirement due to the RPAs identified therein? Second, did the Corps and Reclamation violate NEPA by failing to develop EISs for the RPAs? Judge Simon answered both questions in the affirmative.

Regarding the ESA claims, the court first ruled the "trending toward recovery" standard NOAA incorporated from the 2008 BiOp was arbitrary and capricious. NOAA used that standard to determine that implementing the RPAs would avoid jeopardy to the protected species, including those with dangerously low populations. This standard failed to account for minimum viable abundance levels identified by the agency's experts and lacked any numeric goals that would rationally support a no jeopardy finding. As the court stated, "[w]ithout identifying 'rough' recovery and abundance levels and timeframes, NOAA Fisheries cannot logically conclude that the RPA actions will not appreciably reduce the likelihood that recovery will be attained."

The court also found the jeopardy analysis seriously lacking. NOAA made a no-jeopardy conclusion based upon the asserted benefits to the listed species that accrue from habitat improvement mitigation projects. Under the ESA, mitigation measures supporting a BiOp must be "reasonably specific, certain to occur, and capable of implementation[.]" The mitigation projects proposed in this BiOp failed to satisfy this certainty standard, in part due to the history of slow mitigation project implementation. Moreover, NOAA assumed that when implemented, the mitigation would achieve 100% of the predicted benefits; however, NOAA left no margin of error for project shortcomings or failure. This assumption contravenes the ESA, which "tips the scale toward listed species" by requiring that the risk of mitigation failure not be borne by the species. In other words, a margin of error must be incorporated into the assumptions regarding mitigation effectiveness. Alternatively, the agency must explain its decision to forego using a margin of error.

Turning to the critical habitat component of the BiOp, the court found the "retaining the current ability to become functional" standard NOAA applied to determine whether the RPAs would adversely modify critical habitat seriously deficient. That standard looks to whether the impacted critical habitat is "likely to remain functional (or retain the ability to become functional) to serve the intended conservation role" in both the near and long-term. Though NOAA recognized that the habitat is degraded, the agency's standard only questions whether the habitat will retain the ability to eventually become functional. The court determined that standard falls short of the ESA's requirements—RPAs must generate improvements to avoid adverse habitat modification. Though this does not require returning the habitat to a natural, fully functioning state, "[s]imply maintaining the status quo when there is severely degraded habitat that does not serve its conservation role and will be adversely modified unless changes are made to the operations of the FCRPS does not suffice."

Moreover, the BiOp did not adequately evaluate the impacts of climate change on the listed species and their critical habitat. NOAA primarily relied on the 2008 BiOp's evaluation of climate change, opting only to recite a portion of the multitude of new studies on the impacts of climate change completed between 2008 and 2014. The court found NOAA failed to meaningfully apply this new scientific information. Instead, NOAA summarily concluded that the 2008 BiOp's assumptions and expectations concerning the effectiveness of RPAs adequately addressed the issue of climate change. The court found NOAA could not have rationally concluded the RPAs are sufficient in scope and breadth to avoid the potential jeopardy from climate change. As Judge Simon stated, the climate change analysis "does not apply the best available science, overlooks important aspects of the problem, and fails to properly analyze the effects of climate change, including its additive harm, how it may reduce the effectiveness of the RPA actions, particularly habitat actions that are not expected to achieve full benefits for 'decades,' and how it increases the chances of a catastrophic event." Hence, future BiOps will need to fully contemplate the potential effects of climate change on both the listed species and the habitat.

The court next looked to the NEPA claim that the Army Corps and Reclamation unlawfully failed to formulate EISs for the RPAs. The Plaintiffs based this argument on the Ninth Circuit's 2014 *San Luis & Delta-Mendota Water Authority v. Jewell* decision. That opinion requires agencies to prepare an EIS when deciding to implement the terms of a BiOp. In this case, the Corps and Reclamation failed to develop an EIS for the 2014 BiOp RPAs, relying instead on environmental impact statements issued in 1992, 1993, and 1997. Given that multiple species have garnered ESA protection in the intervening years, additional critical habitat has been designated, and the underlying scientific information has greatly developed, the EISs "prepared in the 1990s are neither current nor sufficient." The agencies could not rely on these "stale" environmental analyses. The court ordered the agencies to prepare new EISs, either in the form of a programmatic EIS with subsequent site-specific EISs or a comprehensive, coordinated EIS.

In the end, Judge Simon ordered that a new BiOp be completed by 2018. The court stopped short, however, of vacating the 2014 BiOp, finding that doing so could result in the cessation of FCRPS activities and would undermine the protections afforded to listed species in the 2014 BiOp. While the decision did not explicitly order the evaluation of Snake River dam removal, like previous rulings on this issue it strongly encouraged such an evaluation.

2. ***Oregon Wild v. U.S. Forest Service***, No. 1:15-cv-00895-CL, 2016 WL 3411554, --- F.Supp.3d ---- (D. Or. June 17, 2017). *Author*: Cody Gregg of Willamette University Law School.

In 2011, the U.S. Forest Service prepared a supplemental addition to a 2007 biological assessment ("BA") evaluating the effects of livestock grazing on areas that had been newly deemed critical bull trout habitat by the U.S. Fish and Wildlife Service (FWS). The assessment and a two-page Letter of Conferral ("LOC") from FWS concluded that livestock grazing would likely have no effect on the habitat and livestock grazing permits could be issued for some of these areas. Non-profit environmental conservation organizations Oregon Wild, Friends of Living Oregon Waters, and Western Watersheds Project, brought suit against the U.S. Forest Service and FWS alleging that authorizing grazing was arbitrary, capricious, and contrary to the

Endangered Species Act ("ESA"), the Clean Water Act ("CWA"), the National Forest Management Act ("NFMA"), and the Wild and Scenic Rivers Act ("WSRA"). Cattle ranchers permitted to graze cattle on the at-issue land intervened as defendants. Plaintiffs, defendants, and defendant-intervenors all filed cross motions for summary judgement and the court ruled in favor of the defendants on all claims.

On the issue of justiciability, the court found that, although biological assessments are not generally considered final agency actions under the APA, the court could review the BA where a final agency action, such as the LOC, expressly relied on it to conclude further action was not necessary. The court could also review Annual Operating Instructions issued by the Forrest Service related to the ongoing grazing of livestock under grazing permits. Additionally, even though the U.S. Forest Service had voluntarily re-initiated the consultation process, the action was not moot because the previous consultation would have effect on the upcoming grazing season and the court could remedy damages occurring in previous seasons.

The court found the general allegations of the defendant's failure to consider important factors in the 2011 consultation process unpersuasive. The plaintiffs alleged that the Forest Service was required to explain in the 2011 BA why their position on the impacts of grazing had substantially changed from their 1998 opinion. The court held that, although agencies are required to explain sudden shifts in position related to environmental impacts of agency activities, the Forest Service was not required to explain this shift in 2011 because it had previously adopted the new position in a 2007 assessment. The court also concluded that federal agencies are not required to consider cumulative effects such as timber harvesting, road construction, and culvert replacement in biological assessments. The requirement to address these factors in formal Biological Opinions was not applicable in the informal context of a BA; the inclusion of this information was at the agencies discretion. Under this standard, the Forest Service was also not required to explain reasonable reliance on mitigation measures as long as they articulated a satisfactory explanation for a "not likely to adversely affect" conclusion.

The court ruled that the plaintiff did not meet their burden of showing (1) any alleged inaccuracies in the BA; (2) that the defendants violated their duties or acted in bad faith under the CWA and/or NFMA, or (3) that the defendants failed to meet or caused any river to fall below Oregon water quality standards as was required by their management plans created pursuant to NFMA obligations. On the plaintiffs final claim under WSRA, the court ruled that although a part of the grazing lands were designated as "scenic," the reduced enjoyment attested to in affidavits submitted by the plaintiff was not sufficient to constitute a WSRA violation.