ENR Case Notes, Vol. 29

Recent Environmental Cases and Rules

Environmental and Natural Resources Section — Oregon State Bar
Devin Franklin, Editor — April 2017

Editor's Note: This issue contains selected summaries of cases issued in January, February, and March of 2017.

A special thank you to our talented contributors for their summaries: Lawson Fite of the American Forest Resource Council, James Saul of the Earthrise Law Center, Ryan Shannon of the Center for Biological Diversity, Cody Gregg of Willamette University Law School, Lindsay Thane of Schroeder Law Offices, P.C., and Alexa Shasteen of Marten Law. If you are interested in summarizing cases or rules, please do not hesitate to contact me.

Devin Franklin
Devin.M.Franklin@ojd.state.or.us

Cases

1. ***Conservation Congress v. USFS***, No. 2:13-cv-01977-JAM-DB, 2017 WL 661959 (E.D. Cal. Feb. 17, 2017). *Author:* Lawson Fite, American Forest Resource Council.

On February 17, 2017, U.S. District Court Judge John A. Mendez issued a ruling upholding the Smokey Project on the Mendocino National Forest against seven of the nine claims brought by Conservation Congress, including all claims under the National Forest Management Act (NFMA) and the Endangered Species Act (ESA). He also concluded the project did not require an environmental impact statement (EIS). However, Judge Mendez found the project fell short on three issues under the National Environmental Policy Act (NEPA)

relating to alternatives with a diameter cap on timber harvest, clarification of operating periods and for the project, and analysis of past monitoring efforts.

The Smokey Project is a Healthy Fuels Restoration Act project that will treat about 6,400 acres to reduce risk of wildfire damage to the Buttermilk Late Successional Reserve (LSR). About 3,500 acres will be commercially thinned. Conservation Congress challenged the project in 2013. The case was stayed for the Forest Service to reinitiate consultation after the designation of expanded northern spotted owl critical habitat. That consultation was completed at the end of 2014. In early February, 2015, the Forest Service discovered information about a new area of activity by an existing owl in the project area, leading to another reinitiation of consultation. The timber contractor, Trinity River Lumber Co. of Weaverville, CA, intervened in the case.

The court's order granted summary judgment on Conservation Congress's claims regarding failure to take a hard look under NEPA and failure to develop a reasonable range of alternatives. The Court denied summary judgment on Conservation Congress's remaining claims for relief and granted Defendants' and Intervenors' cross motions for summary judgment with respect to those remaining claims. Specifically, the court found the project complied with the Mendocino and Northwest Forest Plans, that no EIS was required, and the project complied with the ESA as the Fish and Wildlife Service determined it would not jeopardize the northern spotted owl.

The court determined that although Conservation Congress did not explicitly frame its suggestion to have a cap on timber harvest at 18" diameter at breast height (dbh) as a "proposed alternative," the record was full of suggestions and concerns regarding diameter caps. Thus, the Court held that the Forest Service's decision not to consider an alternative, or at least to explain why it did not consider one, with a larger diameter cap was arbitrary and capricious. The court determined that Limited Operating Periods were stated inconsistently throughout the record, making it difficult to discern the Project's impacts. Judge Mendez concluded that Forest Service had admittedly failed to do the monitoring required for other projects prior to its approval of this Project and the Environmental Assessment (EA) did not address the lack of monitoring in its uncertainty analysis. However, the court sided with Defendants and found that the Forest Service's decision not to prepare a Supplemental EA or EIS was not arbitrary and capricious.

The court requested supplemental briefing regarding remedy. Because the flaws in the EA do not require preparation of an EIS, it is possible that they could be addressed with a short remand for further explanation and clarification of the points identified.

2. ***Global Community Monitor v. Mammoth Pacific, LP,*** No. 2:14-cv-01612-MCE-KJN, 2017 WL 445735 (E.D. Cal. Feb. 2, 2017). *Author:* James Saul, Earthrise Law Center.

Plaintiffs brought this action under the citizen suit provision of the Clean Air Act, 42 U.S.C. § 7604(a), against the owners and operators of five geothermal power plants located in California's Great Basin Valleys Air Basin, alleging eight separate claims stemming from alleged violations of the pre-construction permitting requirements contained in California's state

implementation plan (SIP). After dismissing seven of the plaintiffs' eight claims the court ultimately granted defendants' motion for summary judgment, finding the sole remaining claim barred by the five-year statute of limitations in 28 U.S.C. § 2462.

The permitting agency with jurisdiction over the defendant power plants is the Great Basin Unified Air Pollution Control District; the District has promulgated (and EPA has approved) Rule 209-A to implement the Clean Air Act's prevention of significant deterioration (PSD) preconstruction permitting program within the District's jurisdiction. The core of the dispute centered on the application of that Rule to the defendant geothermal plants, which the plaintiffs alleged had been modified without the requisite permits, and without obtaining emissions offsets or installing the best available control technology (BACT) as the Rule requires.

Plaintiffs only remaining claim at summary judgment was premised on the theory that all four plants should be considered a single source, yet were individually permitted when constructed in the 1980s to avoid Rule 209-A's requirements. The court granted defendants' motion for summary judgment, finding the claim barred by the statute of limitations for several reasons. First, that court found that Rule 209-A creates only a one-time permitting obligation, and does not give rise to repeated or ongoing violations that might survive the running of the limitations period. The court relied upon the two lead cases on this issue, *Nat'l Parks and Conservation Assn. v. Tennessee Valley Authority* ("*NPCA I*"), 480 F.3d 410 (6th Cir. 2007), and *National Parks and Conservation Association v. Tennessee Valley Authority* ("*NPCA II*"), 502 F.3d 1316 (11th Cir. 2007), which reached opposite outcomes but can be reconciled based on the language of the relevant SIP. Here, like the Alabama SIP provision at issue in *NPCA II*, the court found that Rule 209-A did not, by its plain language, impose an ongoing obligation to obtain a preconstruction permit. Thus, the statute of limitations began to run when the plants were originally constructed.

Second, the court rejected plaintiffs' arguments that permitting actions in 2009 and 2014 reset the clock for statute of limitations purposes; the court found those permits merely changed the way the sources were permitted, and were not the result of any actual modification or emissions increase that would have triggered Rule 209-A's BACT requirements. Finally, the court rejected plaintiffs' contention that 28 U.S.C. § 2462's five-year statute of limitations applies only to actions for civil penalties, and thus does not bar their demand for injunctive relief. Recognizing that the Ninth Circuit has not ruled directly on this issue in the Clean Air Act context, the court nonetheless held that because plaintiffs' "claim for injunctive relief is connected to the claim for legal relief," it, too, was barred by § 2462.

3. ***National Wildlife Foundation v. National Marine Fisheries Service***, No. 3:01–cv–0640–SI, 2017 WL 1135610 (D. Or. March 27, 2017). *Author:* Lindsay Thane, Schroeder Law Offices, P.C.

Plaintiffs and Intervenor-Plaintiff State of Oregon moved for injunctions under the Endangered Species Act ("ESA") and the National Environmental Policy Act ("NEPA") while the Plaintiffs and Federal Defendants worked to finalize a remand order that established the

timing of NEPA compliance, as required by Judge Simon's 2016 Opinion in the case. Judge Simon's 2016 Opinion concluded that NOAA Fisheries violated the ESA by adopting a 2014 biological opinion ("BiOp") that was inadequate on six grounds. In that opinion, the Court also found the Army Corps of Engineers ("Corps") and the Bureau of Reclamation ("BOR") violated NEPA by failing to prepare a comprehensive environmental impact statement ("EIS"). The Court retained jurisdiction over the case to ensure the Federal Defendants develop mitigation measures to avoid jeopardy, produce and file a BiOp that complies with the ESA and the Administrative Procedures Act, and prepare an EIS that complies with NEPA.

Plaintiffs first moved for an injunction under the ESA, requesting the Federal Defendants provide additional spring spill in the Federal Columbia River Power System ("FCRPS") at maximum spill levels that still meet state law requirements for total dissolved gas beginning in 2017 and continuing for subsequent years. The Court noted that when determining whether to issue the injunction under ESA Section 7 it need only find that operation of the FCRPS will cause salmon to suffer imminent harm of any magnitude, not the more burdensome requirement of showing harm at the species level, as argued by the Federal Defendants. The Court acknowledged that the benefits of additional spill have not been sufficiently studied or proven; however, the Court stated there does not need to be perfect knowledge to support an action so long as the action is consistent with the best available science, and the Court found increased spill will benefit the listed species. The Court delayed requiring increased spill until 2018 to give the Federal Defendants time to study any issues associated with increased spill and to determine how to tailor the spill to each unique dam to increase salmonid survival.

Plaintiffs next moved for an injunction requiring Federal Defendants to operate the juvenile bypass and Passive Integrated Transponder ("PIT") tag detection system beginning March 1 of each year. The Court issued the injunction in response to Plaintiffs' assertion that monitoring will provide data regarding the early and late "tail" of the salmon and steelhead runs, which are important for diversity as those fish contain many of the population traits that support adaptation to environmental changes. The Court ordered that PIT tag monitoring will begin in 2018.

Finally, Plaintiffs moved under the National Environmental Policy Act ("NEPA") for an injunction prohibiting the Corps from spending additional funds on projects at Ice Harbor Dam and on any new capital improvement projects on any of the four Lower Snake River Dams that would cost more than one million dollars. Plaintiffs' argued that NEPA does not allow agencies to commit resources that prejudice the selection of alternatives before making a final decision and that such commitment of resources may limit the choice of reasonable alternatives. The Court recognized the harm that Plaintiffs sought redressed was a biased NEPA process and explained that a compliant NEPA analysis will likely require considering the alternative of breaching, bypassing or removing one of the Lower Snake River Dams. The Court went on to highlight that economic considerations influence decision making and such economic considerations would be inadequately accounted for if the Corps spent money on the dams during the remand such that those expenditures would not be considered in the analysis of reasonable alternatives. The Court enjoined any expenditures at the four Lower Snake River Dams that are not required for safe dam operation.

However, the Court did not enjoin the $37 million projects to replace two turbines at the Ice Harbor Dam as requested by Plaintiffs. The Court found that while the significant expenditures may cause irreparable harm in considering these projects in the NEPA analysis, the balance of harm and the public interest in saving endangered species outweighed the injunction requested. The Court stated the replacement of the turbines have a primary benefit of increasing fish survival. Further, the Court was unwilling to enjoin projects more than $1 million generally as those expenditures may similarly provide immediate improvement. The Court did require the Federal Defendants to disclose "sufficient information" to Plaintiffs regarding the planned projects at each dam during the NEPA remand.

4. ***Natural Resources Defense Council v. McCarthy***, No. 16-CV-02184-JST, 2017 WL 491147 (N.D. Cal. Feb. 7, 2017). *Author:* Ryan Shannon, Center for Biological Diversity.

This case concerns waters subject to two water quality control plans that implement water quality standards (WQSs) issued by the California State Water Resources Control Board (SWRCB) and approved by EPA—the 1995 San Francisco Bay/Sacramento-San Joaquin Delta Estuary Water Quality Control Plan ("Bay-Delta Plan") and the Sacramento River Basin and San Joaquin River Basin Plan ("Central Valley Plan"). *NRDC v. McCarthy*, No. 16-cv-02184-JST, 2017 U.S. Dist. LEXIS 17355, at *2 (N.D. Cal. Feb. 7, 2017).

In 2014, in an emergency proclamation, Governor Brown told the SWRCB to consider altering applicable requirements for reservoir releases and diversion limitations if they were established to implement a water quality control plan. *Id.* at *3. He also suspended a section of the California Water Code which required State agencies to comply with water quality control plans. *Id.* at *3–*4. Following that order, several water users filed temporary urgency change petitions ("TUCPs") requesting changes to the WQSs in the Bay-Delta Plan and the Central Valley Plan. *Id.* at *4. The SWRCB granted these petitions and amended or rescinded certain requirements of the water quality control plans. *Id.* at *4–*5.

Under the CWA, while states have the primary responsibility to adopt and revise water quality standards, EPA must review and approve any new or revised standards to make sure they comply with the Clean Water Act (CWA) and provide protection for designated uses. Unless a new or revised standard is approved, it cannot go into effect. *Id.* at *5–*6. NRDC and several other environmental organizations filed suit against EPA arguing that it failed to comply with its non-discretionary duty under the CWA "to review and take appropriate action regarding revisions to water quality standards in the Bay-Delta and Central Valley Plans" after from the issuance of several TUCPs which exempted entities from certain water quality standards. *Id.* at *5 (citing 33 U.S.C. §§1313(c)(2)(A), (c)(3)-(c)(4)). In response, Defendants argued Plaintiffs' claims were moot because the TUCPs at issue had all expired and there were no current TUCPs in effect. *Id.* at *10–*11. They also sought to dismiss the case for failing to state a claim because they argued that the TUCPs did not constitute revisions to water quality standards. *Id.* at *14.

The court found both arguments unavailing. First, the court found that it could still grant declaratory relief because the dispute was "capable of repetition, yet evading review" as the SWRCB process for granting the TUCPs was "too shot to allow full litigation before it ceases" and the orders expired after 180 days. *Id.* at *11 (internal quotations marks and citations omitted). It also found that the dispute was likely to reoccur since drought would foreseeable reoccur in the near future, likely leading to the issuance of new TUCPs. *Id.* a *12.

Second, regarding whether Plaintiffs failed to state a claim, the court stated that the issue was whether the TUCPs qualified as "revisions" to the existing water quality standards. *Id.* at *14. Invoking *Chevron* deference, the court noted that the statute did not define "water quality standards," and that while EPA's regulations did, they did not define what constituted a "revision" to a water quality standard. *Id.*at *15-*16. The court therefore looked to EPA's Water Quality Standards Handbook noting that it defines a revision, in part, as "[a] provision that establishes a new WQS or has the effect of changing an existing WQS." *Id.* at *15–*16. Relying on that definition, the court asked "whether Defendants have demonstrated as a matter of law the TUCP orders do not revise California's water quality standards[,]" and found that they have not. The court subsequently denied Defendants motions to dismiss under 12(b)(1) and 12(b)(6).

5. ***Oregon Wild v. Cummins***, No. 1:15–cv–01360–CL, 2017 WL 923917 (D. Or. March 8, 2017). *Author:* Alexa Shasteen, Marten Law.

Plaintiffs challenged the U.S. Forest Service's decision to approve continued livestock grazing on eight allotments of land in the Upper Klamath Basin. The region is home to two endangered fish species, the Lost River sucker and the shortnose sucker. On cross-motions for summary judgment, the United States District Court for the District of Oregon ruled in favor of the Forest Service.

After briefly dispensing with Defendants' standing challenge, the Court considered Plaintiffs' Endangered Species Act ("ESA"), National Forest Management Act ("NFMA"), and National Environmental Policy Act ("NEPA") challenges to the Forest Service's decision.

First, Plaintiffs contested the outcome of the Forest Service's required consultation with the U.S. Fish and Wildlife Service (FWS), which had "conclu[ded] that grazing is not likely to adversely affect suckers' critical habitat." Plaintiffs asserted this conclusion, articulated in FWS's letter of concurrence ("LOC"), was "arbitrary, capricious, an abuse of discretion, and not in accordance with the ESA, thus violating the [Administrative Procedure Act]." Plaintiffs argued the agencies "ignored 'the combined effects of grazing and water impoundments'" and instead "'compared the effects of grazing to the degraded baseline caused by low water flows,'" even though they were required to consider the "'direct and indirect effects of an action on the species or critical habitat, *together* with the effects of other activities that are interrelated or interdependent with that action.'" The Court did not reach these arguments, however. It concluded "Plaintiffs' ESA claim [wa]s moot because the 2014 LOC covered only the 2014,

2015, and 2016 grazing seasons; thus, the Forest Service [would need to] complete a new ESA consultation prior to any livestock grazing in 2017."

Second, the Court addressed Plaintiffs' assertion that the Forest Service violated the NFMA by failing to comply with the Inland Native Fish Strategy ("INFISH," which is part of a Land and Resource Management Plan, or forest plan), which requires the Forest Service "'modify grazing practices...that retard or prevent the attainment of [Riparian Management Objectives ("RMOs")] or are likely to adversely affect inland fish' and to 'suspend grazing if adjusting practices is not effective in meeting RMOs.'" Plaintiffs cited data indicating "conditions on several streams throughout the challenged allotments were" not meeting RMOs. The Court disagreed, finding Plaintiffs had not proffered sufficient evidence that grazing was the cause of any failure to attain RMOs. In so finding, the Court noted the "substantial deference" afforded the Forest Service's interpretation of its own forest plans. Furthermore, the Court added, INFISH RMOs were intended to be evaluated at a watershed level, not stream-by-stream.

Third, the Court addressed Plaintiffs' argument that the Forest Service violated NEPA by failing to conduct an adequate cumulative impacts analysis as part of its 2009 Environmental Assessment ("EA"), which "found grazing would have no significant impact on the area assessed." The Court held Plaintiffs failed to exhaust their administrative remedies under NEPA because they did not exercise their right under the Forest Service Decisionmaking and Appeals Reform Act to challenge the Forest Service's finding of no significant impact. Finally, the Court concluded the Forest Service was not required to supplement its 2009 EA, as Plaintiffs failed to demonstrate any significant new information had come to light since its completion.

6. ***Yurok Tribe v. United States Bureau of Reclamation*****,** No. 16–cv–06863–WHO, 2017 WL 512845 (N.D. Cal. Feb 8, 2017). *Author:* Cody Gregg, Willamette University Law School.

The Klamath Irrigation Project alters and lowers the water flows on the Klamath River to provide water to irrigation districts in Oregon and Northern California. The Bureau of Reclamation operates the Klamath Project. In 2013, the National Marine Fisheries Service (NMFS) released a Biological Opinion and incidental take statement that outlines the projected impact of the Klamath Project's operations on threatened species and sets the permissible *C. shasta* disease rates among Coho salmon to 49 percent. This BoOp was binding on the Bureau of Reclamation. In 2014 and 2015, the Klamath River's Coho salmon population suffered outbreaks of *C. shasta* far exceeding the incidental take maximum outlined in the NMFS incidental take statement: 81 percent infection in 2014 and 91 percent in 2015.

The Hoopa Valley Tribe and the Yurok Tribe, joined by several fishing associations, filed separate suits alleging, among other things, that the Bureau of Reclamation (Bureau) and NMFS violated the ESA by failing to reinitiate formal consultation following the two years of record rates of disease among Coho salmon. The plaintiffs filed for partial summary judgment seeking a declaration that the federal defendants violated the ESA, injunctive relief compelling the formal consultation process mandated under 50 C.F.R 402.16, and an injunction putting

protective water flows in place to reduce disease rates while the federal defendants complete the formal consultation process.

The federal defendants and irrigation and drainage districts that hold water contracts with the Klamath Project opposed the motion for summary judgment and moved to limit review to the administrative record. They also filed a motion to dismiss, or in the alternative to stay, the claims brought by Hoopa Valley.

The court denied the defendants motion to limit review to the administrative record concluding that the plaintiffs' reinitiation claim against the Bureau was brought under the ESA citizen suit provision and that review of that claim is not limited to an administrative record. With regards to the claim against NMFS, although brought under the APA, the court found it is a failure to act claim and is therefore similarly not limited to an administrative record. The court, however, relied exclusively on the record evidence to assess the merits of plaintiffs' reinitiation claims because the same result would be reached.

The court granted the plaintiffs' motion for summary judgment. In rejecting the defendants' various arguments against the motion the court concluded that the federal defendants violated the ESA because they delayed two years before reinitiating formal consultation after the incidental take trigger was exceeded in 2014. The court also found that preliminary injunctive relief, pending completion of formal consultation, was an appropriate remedy for the procedural violation. The court discusses at length how the injunctive relief requested was supported by the best available science and plaintiffs' proposal that the parties' technical experts confer on the precise timing, duration, volume, and manner of any potential injunctive flows will allow the parties to address the Bureau's needs to maintain sufficient water for the sucker fish (two species of endangered fish also impacted by the Klamath Project), comply with various regulations, and manage safety concerns.

The defendants' motion to dismiss alleged that the following claims were not cognizable against the NMFS: (1) failure to reinitiate formal consultation; (2) violation of the ESA by "taking" more threatened Coho salmon than the amount authorized in the incidental take statement; and (3) violation of the APA and Magnuson–Stevens Fishery Conservation and Management Act by failing to consult on essential fish habitat. The court dismissed the "taking" claim because the NMFS does not operate the Klamath Project. However, the court upheld both consultation claims. The court agreed that the plaintiffs could not compel the NMFS to engage in formal consultation in a citizen suit under the ESA, but, under the APA and 16 U.S.C. § 1855(b)(4)(A), the court found that reinitiating consultation was a required action and therefore both claims for failure to act could move forward.

The court also denied the defendants' motion to dismiss the "taking" claim against the Bureau. The Bureau asserted that it should be exempted from penalties as a safe harbor under Section 7(c)(2) of the ESA so long as it continues to operate the Klamath Project in line with the terms and conditions of the incidental take statement. The court agreed with the agency that the safe harbor provision would be problematically weak if the "triggering" action itself subjected the agency to Section 9 penalties, even though it had complied with all the terms and conditions outlined in the relevant biological report. However, the court found that the safe harbor can only

be read to apply to the initial triggering take and not all subsequent violations as well. Because the initial violation was in 2014 and a subsequent violation took place in 2015, the claim could not be dismissed.

The court also denied the defendant's motion to dismiss on grounds of prudential mootness and failure to plead imminent injury, as well as their request in the alternative to stay the plaintiffs' claims so they can focus on the consultation process.