ENR Case Notes, Vol. 18

Recent Environmental Cases and Rules

Environmental and Natural Resources Section — Oregon State Bar
Matthew Preusch, Editor — July 2014

Editor's Note: This issue contains selected summaries of cases issued in April, May, and June of 2014.[1] *Please contact me if you have any comments or suggestions about the newsletter, or if you would like to recommend a case or rule for inclusion in future issues. Thank you to Willamette Law Online for their invaluable case summaries. If you are interested in summarizing cases and rules, please contact me.*

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9th Circuit Court of Appeals

In Defense of Animals v. Dep't of the Interior, No. 12-17804, ___ F.3d ___ (9th Cir. May 12, 2014), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2014/05/12/12-17804.pdf
Kary DeVaney, Willamette Law Online
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[1] This volume also includes a summary of the lengthy *Barkers Five* opinion that the Court of Appeals issued in February.

http://willamette.edu/wucl/resources/journals/wlo/9thcir/2014/05/in-defense-of-animals-v.-dept-of-the-interior.html

This case concerned Bureau of Land Management's ("BLM") management of wild horses and burros on public land. In 1981, the BLM designated approximately 800,000 acres surrounding the California-Nevada border as a Health Management Area ("HMA"). This designation charges the BLM with the maintenance of wild horse and burro herds in the HMA. Those herds exceeded the Appropriate Management Levels ("AML") for wild horses by 300% and for burros by 240%. The BLM released an Environmental Assessment based upon comments from 250 sources and its own predictions. The BLM concluded that, if left unchecked, the wild horse population would seriously impact ecological areas and cultural sites within the HMA.

In July 2010, the BLM released a Finding of No Significant Impact ("FONSI") regarding its plan to gather wild horses and burros, but the agency did not prepare an environmental impact statement ("EIS") with the FONSI. In August and September of 2010, the agency gathered wild horses and burros, sorted them by sex, and examined them. The agency then released the animals with a 60:40 stud to mare ratio, and the mares were injected with an immunocontraceptive. Lame animals were euthanized and the excess animals were sold, adopted or sent to long-term facilities.

Before the gather, In Defense of Animals filed suit against the Department of the Interior and the BLM alleging the proposal violated the Wild Free-Roaming Horses and Burros Act ("Act") and that the failure to release an EIS was arbitrary and capricious. The district court denied the motion. On appeal, the panel held that the BLM had not violated the Act because it had acted within its authority to maintain the HMA. The panel also held that the BLM's decision to not release an EIS was not arbitrary and capricious because the BLM provided a convincing and thorough FONSI.

LOWD/BMBP v. Connaughton, No. 13-35653, ___ F.3d ___ (9th Cir. May 8, 2014), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2014/05/08/13-35653.pdf.
Bradley Thayer, Willamette Law Online
Summary reprinted with permission of and first published by Willamette Law Online at http://willamette.edu/wucl/resources/journals/wlo/9thcir/2014/05/lowdbmbp-v.-connaughton.html.

The Snow Basin project area lies in the Wallowa-Whitman National Forest ("the Forest') in northeast Oregon. Since 2008, the United States Forest Service ("USFS") has been preparing to launch a logging project there. The USFS issued a draft environmental impact statement ("EIS") in March of 2011, before issuing a final EIS ("FEIS") in March of 2012. In April of 2012, the Forest Supervisor removed the Forest's Travel Management Plan ("TMP"). The TMP had aimed to regulate off-road motorized vehicle use, reduce the number of roads in the Forest, and address environmental harms from the logging project.

Plaintiffs League of Wilderness Defenders/Blue Mountain Biodiversity Project and the Hells Canyon Preservation Council filed suit to enjoin the logging project on the grounds that the

USFS violated the National Environmental Policy Act ("NEPA"). The district court held that the plaintiffs were unlikely to succeed, and that the balance of harms did not tip sufficiently in the plaintiffs' favor. The district court therefore denied the plaintiffs' motion for a preliminary injunction. The plaintiffs timely filed notice of appeal.

On appeal, the Ninth Circuit held that, because the FEIS' discussion of elk habitat failed to satisfy NEPA's clarity requirements in light of the withdrawal of the TMP, the plaintiffs had shown they were likely to prevail on their NEPA claim. Further, the panel held the plaintiffs had shown, in the absence of a preliminary injunction, they were likely to face irreparable harm, because thousands of mature trees would be logged and this could not be remedied without difficulty. Finally, the panel held that the plaintiffs had established the balance of equities tipped in their favor, because the private economic harms at issue were outweighed by the threat of irreparable harm to elk habitat. The Ninth Circuit affirmed in part, reversed in part, and remanded to the district court.

Oregon Supreme Court

Noble v. Dept. of Fish and Wildlife, No. S060518, __ Or. __ (May 15, 2014), *available at* http://www.publications.ojd.state.or.us/docs/S060518.pdf.
Stephanie Harmon, Willamette Law Online

Petitioner's appealed the Court of Appeals' decision upholding a final order by the Oregon Department of Fish and Wildlife (ODFW) that approved fishways on two dams. Those dams sat downstream from Petitioners' property, on a small stream that ran through it. Petitioners' created fish habit on their property in the hope that fish would populate it. Petitioners sought to have those dams removed to further that project. The dams' owners obtained permits, which allowed the dams to remain so long as they contained adequate fish passage. Both owners installed fishways, which were approved by ODFW. Petitioners sought review of ODFW's approval. The Office of Administrative Hearings upheld ODFW's approval and the Court of Appeals affirmed. Petitioners then sought review by the Supreme Court.

The parties disagreed as to the "year-round" requirement of an ODFW fish passage rule, OAR 635-412-0035(2)(a). ODFW argued that "year-round" is only applicable when water is flowing through the dam and fishway. Petitioners disagreed that the rule contains such a restriction, and they argued the passage must be provided regardless of whether the flow is within the range of the fishway. The Supreme Court agreed with the Petitioners and found ODFW's interpretation of the rule was inconsistent with the requirement that a dam fishway must be available at times required by the life cycles of the fish.

Oregon Court of Appeals

Barkers Five, LLC v. LCDC, No. A152351, __ Or. App. __ (Feb. 20, 2014), *available at* http://www.publications.ojd.state.or.us/docs/A152351.pdf.
Logan Leichtman, Editor in Chief, Willamette Law Online

In August 2012, the Land Conservation and Development Commission (LCDC) issued an order acknowledging a submission designating urban and rural reserves in the Metro area. On review, twenty-two petitioners contended LCDC erred in application of the principles that govern this designation. The Court began by rejecting, without discussion, two systemic contentions: that the rules governing the decision (OAR 660-027) were invalid, and that Metro lacked the authority to designate reserves outside of its boundaries. The Court then rejected two contentions that the order was unlawful in substance: one claim that the amount of land designated exceeded the statutory cap, and multiple claims that LCDC erred in application of statewide planning goals.

Next, the Court addressed challenges to the LCDC "consideration" of urban and rural reserve factors, finding that LCDC's construction, which required those factors to be evaluated, applied, and balanced as a whole in the same manner as Goal 14 boundary location factors, was correct. The Court upheld LCDC's interpretation of its own rules, detailing five premises which it found plausible and their interpretation of the "best achieves" standard of OAR 660-027-0005(2), holding this was also valid by identifying four premises on which LCDC based its interpretation.

Looking to individual challenges, the Court agreed that LCDC erred in approving Washington County's misapplied rural reserve factors, disagreed with a similar contention regarding Clackamas County, and agreed with Barkers' contention that Multnomah County had inadequately considered rural reserve factors. Lastly, the Court reviewed challenges to the order, which contended LCDC had not supported its decision by "substantial evidence." The Court upheld this challenge with respect to the designation of the Stafford area as an urban reserve. The Court concluded LCDC had erred on four points in the order, three of those causing the order to be unlawful in substance. Consequently, the Court reversed and remanded the order.