Recent Developments in Environmental Law

I. FEDERAL LAND POLICY AND MANAGEMENT ACT

Utah v. Babbitt, 137 F.3d 1193 (10th Cir. 1998)

In October 1996, the State of Utah, the Utah School and Institutional Trust Lands Administration, and the Utah Association of Counties (collectively, Plaintiffs) brought suit in the United States District Court for the District of Utah, challenging the Department of the Interior's decision to inventory select public lands in Utah for wilderness characteristics. The district court issued a preliminary injunction on November 15, 1996, enjoining the Department of the Interior and the Bureau of Land Management (Defendants) from proceeding with the inventory. It is from that decision that the Defendants appealed, giving rise to the case at hand.

The duty to conduct a public land inventory is mandated by the Federal Land Policy and Management Act (FLPMA), Section 201. This section requires the Secretary of the Department of the Interior (Secretary) to carry out a nationwide inventory of public lands for the purpose of determining their suitability for designation and preservation as wilderness. The wilderness review process consists of three stages: first is the inventory stage conducted to identify "wilderness inventory units," defined as areas of at least 5,000 acres that might possess wilderness characteristics. The second phase of the inventory stage is a

more intensive examination of the "wilderness inventory units" to determine whether any of them actually contain wilderness characteristics. Those units that do are then labeled "wilderness study areas" (WSAs). Second is the study stage, in which the WSAs are examined to determine their suitability for actual designation as wilderness. Last is the reporting stage, in which the Secretary recommends certain areas to the President for wilderness designation, and the President then makes his recommendations to Congress, which must formally designate wilderness areas by law.

The initial inventory and review of public lands in Utah commenced in the late 1970s. However, despite the fact that President Bush recommended to Congress that 1.9 million acres of public lands in Utah be designated as wilderness in the early 1990s, Congress had not yet passed any legislation as of 1996. Consequently, the Secretary of the Interior, Bruce Babbitt, decided to re-inventory federal lands in Utah, the process at the heart of this litigation.

The court first dealt with the matter of standing set forth in Article III of the U.S. Constitution that restricts the jurisdiction of federal courts to adjudicate only actual cases or controversies. Since it has been held that the party invoking federal jurisdiction bears the burden of establishing the elements of standing, the court set out to examine each of the Plaintiffs' alleged injuries.

The Plaintiffs' first alleged injury resulted from the actions of the Defendants, which were allegedly taken without authority and in contravention of established legal procedures. The court held that an asserted right to have Government officials act in accordance with the law is not enough to satisfy standing requirements because the Plaintiffs must go further and identify concrete injuries which flow from the Defendants' supposedly unlawful actions.

Second, the Plaintiffs claimed injuries as a result of the Defendants' refusal of public participation in the inventory process, a violation of FLPMA Section 201. Regarding this alleged injury, the court held that FLPMA Section 201 contained no explicit provision for public participation in the inventory process. Furthermore, the court found nothing to suggest that conducting an inventory pursuant to Section 201 also qualified as land use planning under Section 202 that explicitly mandates public participation.

Third, the Plaintiffs claimed the Defendants had unlawfully imposed a de facto wilderness management standard on non-WSA lands. The Plaintiffs claimed this had caused them injury by limiting access to state trust lands that happened to be surrounded by public lands whose use was now limited. The court believed that the injury claimed was purely

speculative, due to the fact that it was premised on the assertion that the Defendants would neglect to provide notice and comment when the wilderness management standard was applied at some future time.

Fourth, the Plaintiffs claimed that in conducting the 1996 inventory, the Defendants applied a different definition of "roadlessness" than what is called for in FLPMA, a prerequisite for designating land as wilderness. Consequently, the Plaintiffs alleged that, due to the more lenient standard, more lands will be deemed "roadless," and thus, suitable for wilderness designation. In addition, the Plaintiffs claimed that the Defendants changed their road maintenance policies as a consequence of the decision to prepare the 1996 inventory. The court responded to this claim first by reiterating the need to express an explicit injury to meet standing requirements. Next, the court noted that the decision made by the Defendants to change their road maintenance policies was not only questionably related to the decision to prepare the inventory but also that an injunction preventing the completion of the inventory would not force the Defendants to reinstate their previous road maintenance policies. Thus, the Plaintiffs also failed to satisfy the element of standing requiring the moving party to show how their alleged injury would be redressed by a decision in their favor.

Fifth and finally, the Plaintiffs asserted that they were injured by the Defendants' failure to prepare an Environmental Impact Statement as mandated by the National Environmental Policy Act (NEPA), Section 102. The court held that conducting an inventory of public lands did not constitute a "major federal action significantly affecting the quality of the human environment" as required by NEPA Section 102. The court noted that FLPMA Section 201, the provision governing the inventory process, states explicitly that an inventory does not by itself change or prevent a change in the management or use of affected public lands. As a result, the court concluded that, as far as the Plaintiffs' causes of action related to the 1996 inventory were concerned, the Plaintiffs lacked the requisite constitutional standing. Thus, the court remanded to the district court with instructions to dismiss those causes of action.

The court then considered the Plaintiffs' direct challenge of the Defendants' alleged imposition of a de facto wilderness management standard on non-WSA lands. This cause of action did not similarly fail to meet the requisite standing requirements because the Defendants' alleged decision to impose this standard arose in response to a letter from the Secretary written three years before the decision was made to conduct the 1996 inventory. The Plaintiffs claim injury as a result of their inability to comment on what amounts to an amended land use plan and because the imposition of the wilderness management standard impaired their ability

to lease their state trust lands. On this cause of action, the court held that the Plaintiffs' general allegations of injury were based upon a legally cognizable right provided by FLPMA. Finally, the Plaintiffs satisfied their standing requirements by showing a concrete injury and because a favorable decision to enjoin the Defendants would redress their injuries. Consequently, the court remanded this last cause of action to the district court for further consideration.

Eric M. McLaughlin

II. ENDANGERED SPECIES ACT

U.S. v. Clavette, 135 F.3d 1308 (9th Cir. 1998)

The Ninth Circuit Court of Appeals affirmed the decision of the United States District Court for the District of Montana convicting Paul Clavette of killing a grizzly bear in violation of the Endangered Species Act (ESA).

Clavette raised two claims on appeal: first, whether the district court's denial of Clavette's request for a jury trial violated his constitutional rights, and second, whether the evidence was sufficient to sustain his conviction.

Addressing the jury trial issue first, the court restated the Supreme Court's determination that as a matter of constitutional law, a lower court need not grant a jury trial for a "petty" offense. A petty offense, according to the Supreme Court, is an offense punishable by a prison term of six months or less. The rule is stated in terms of a presumption that the accused may rebut by introduction of additional evidence. The Ninth Circuit then reviewed other similar cases to determine whether Clavette's conviction, which included a three year probation sentence, a $2,000 fine, and a $6,250 restitution claim, fell within the definition of a petty offense. The Ninth Circuit held that the ESA's statutorily allowed $25,000 fine coupled with a prison term provision of not more than six months was within the category of offense considered by Congress as not serious. Clavette's punishment and penalties were a petty offense, and, thus, the district court's denial of a jury trial was not a violation of Clavette's constitutional rights.

As to the second issue, the court looked to the four elements of the crime of knowingly taking an endangered species: first, that the accused knowingly killed a bear; second, that the bear was a grizzly bear; third, that the accused killed the grizzly bear without a permit; and fourth, that the accused did not act in self defense or in defense of others in killing the

grizzly. The only issue at trial was whether Clavette acted in self-defense, or in defense of his wife. Clavette presented evidence of self-defense at trial, and the Government successfully rebutted Clavette's affirmative defense.

Examining the facts of the case, the Ninth Circuit found that Clavette and his wife changed their version of the facts several times during the course of the case. Their versions were also inconsistent with the physical evidence found at the site and inconsistent with the report of the wildlife laboratory supervisor who examined the bear. Citing these inconsistencies, the Ninth Circuit held that a reasonable person could have found beyond a reasonable doubt that Clavette's self-defense claim was unmeritorious.

Amanda M. Hubbard

III. CLEAN WATER ACT

Montana v. EPA, 137 F.3d 1135 (9th Cir. 1998)

Plaintiff-appellants, state and municipal entities who own fee interests in land located within the Flathead Indian Reservation (collectively referred to as Montana), made a facial challenge to EPA regulations promulgated pursuant to Section 518(e) of the Clean Water Act (the Act). This section authorizes the EPA to treat Indian tribes as states (TAS status) for purposes of reviewing and approving the Tribes' proposed water quality standards (WQS) pursuant to Section 303 of the Act. Montana challenged the EPA's decision to grant TAS status to the Confederated Salish and Kootenai Tribes because the regulations would permit the Tribes to exercise authority over reservation lands and surface waters owned in fee by nonmembers of the Tribe. The district court granted summary judgment to the defendants, and the Ninth Circuit affirmed.

In 1992, the Tribes applied for TAS status regarding all surface waters within the Flathead Indian Reservation. The Reservation contains Flathead Lake, which provides water for domestic, industrial, and agricultural uses on the lands within the Reservation boundaries. The Tribes identified several facilities on fee lands that had the potential to impair the water quality and beneficial use of the tribal waters. Despite Montana's objection, the EPA director approved the TAS application after determining the Tribes possessed inherent authority over nonmembers on fee lands.

In reviewing the EPA's determination of the scope of tribal inherent authority, the Ninth Circuit first stated that generally, absent express authorization by federal statute or treaty, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation. Citing *Montana v. United States*, 450 U.S. 544 (1981), the Ninth Circuit noted that two exceptions to this rule occur when either (1) the nonmembers enter consensual relationships with the Tribe or its members, or (2) the conduct concerned threatens or directly impacts the political integrity, economic security, or the health or welfare of the Tribe. In order for the "Montana rule" to apply, there must be a nexus between the regulated activity and the tribal self-governance. Petitioner-appellants argued that the Tribes should be able to exercise nonconsensual regulation of nonmembers when all federal remedies to alleviate any threats to tribal well-being were exhausted.

Although the Ninth Circuit found the EPA's delineation of the scope of tribal inherent authority was not entitled to deference because it was a question of law, it held that the EPA did not commit any "material mistakes of law." The court found the Agency took a "cautious view" of tribal inherent authority by requiring the potential impact of regulated activities to be "serious and substantial." Moreover, the Ninth Circuit rejected the argument that inherent authority exists only when no other government can act. Citing the EPA finding of a serious and substantial threat to tribal well-being, the Ninth Circuit reaffirmed their previous rulings which recognized threats to water rights may invoke inherent tribal authority over non-Indians. Therefore, the court affirmed the district court decision that the EPA's regulations regarding the granting of TAS authority reflected the appropriate delineation and application of inherent tribal regulatory authority over nonconsenting nonmembers.

Diane Lewis

Waste Action Project v. Dawn Mining Corp., 1998 WL 100302 (9th Cir. Mar. 10, 1998)

In 1996, appellant Waste Action Project (WAP) filed this Clean Water Act (CWA) suit against Dawn Mining Company (Dawn) (the complaint was later amended to include Newmont Mining Company and Newmont Gold Company). The complaint alleged that Dawn violated the CWA when it discharged uranium mill tailings into Chamokane Creek without a National Pollutant Discharge Elimination System permit (NPDES permit). The United States District Court for the Eastern District of Washington approved the mining companies' motion for summary

judgement on the basis that the uranium mill tailings and associated wastes specified by WAP were "byproduct material" as defined in Section 11(e)(2) of the Atomic Energy Act (AEA) and not "pollutants" under the CWA. On appeal, the Ninth Circuit Court of Appeals affirmed the district court's grant of summary judgement for the appellee mining companies.

From 1957 until 1982, Dawn mined uranium on its site in Ford, Washington. The milling process created significant amounts of byproducts containing residual quantities of uranium. Dawn disposed of these wastes at four tailing disposal areas (TDAs) around the millsite. Because three of the sites were unlined, tailings from these sites migrated into the groundwater and nearby Chamokane Creek. Following the cessation of mining operations in 1982, Dawn began to work with state and federal regulators to develop closure plans for the millsite. The plan included a comprehensive remedial program that addressed the surface and groundwater contamination resulting from the leakage from each tank. The closure plan, subjected to extensive regulatory review, was approved by the Washington Department of Health in 1995, which issued an amended radioactive material license authorizing closure of the millsite.

The Ninth Circuit found that WAP's appeal was based purely on a question of statutory interpretation within the CWA. Specifically, the court addressed whether uranium mill tailings were "pollutants" within the meaning of the CWA's NPDES permit requirements.

Appellant WAP's first argument asserted that uranium mill tailings were "pollutants" under the CWA and that Dawn's discharge of the tailings without a valid NPDES permit constituted a violation of the CWA. To support this argument, WAP looked to the legislative history of the Atomic Energy Act (AEA) as amended by the Uranium Mill Tailings Radiation Control Act (UMTRCA) in 1978, to assert that the AEA preserves the regulatory control of the EPA pursuant to the enactment of the CWA. The Ninth Circuit disagreed with this assertion. First, the court noted that a plain reading of the amended statute indicated that uranium mill tailings were not within the scope of EPA regulation under the CWA. The court found that even though uranium mill tailings were not specifically included in the definition of "byproducts" under the AEA when the CWA was enacted, Section 11(e)(2) of the amended AEA includes uranium mill tailings in the definition of "byproducts" of radioactive materials. The court also noted that although the CWA defines "pollutant" to include radioactive material, Congress specifically gave the Atomic Energy Commission exclusive authority to regulate uranium mill tailings through the AEA that preempted regulation by other

agencies and had no intention of requiring NPDES permits for such material.

WAP's next argument asserted that the savings clause of the UMTRCA, 42 U.S.C. § 2022(e), which states that nothing in the UMTRCA changed the EPA's existing regulatory powers, implied that the EPA still has regulatory authority over uranium mill tailings because mill tailings were not previously defined as byproducts. Again, the Ninth Circuit rejected WAP's argument, stating that the UMTRCA was designed to give the Nuclear Regulatory Commission the power to regulate tailings at inactive sites and was in no way designed to transfer this power to the EPA. The court also noted that the EPA's consistent regulatory interpretation of the term "pollutant" indicates that materials regulated under the amended AEA are clearly excluded from the CWA's NPDES requirements. Finally, the court found that the Supreme Court had directly addressed a very similar problem in the past when it held that the pollutants subject to regulation under the CWA did not include byproduct nuclear material.

In sum, the Ninth Circuit affirmed the district court's grant of summary judgment, holding that uranium mill tailings are not "pollutants" under the CWA and, therefore, not subject to the EPA's NPDES permitting requirements.

Thomas T. Toland, Jr.

IV. CLEAN AIR ACT

Appalachian Power Co. v. EPA, 135 F.3d 791 (D.C. Cir. 1998)

This case involved the EPA's duty under Title IV of the Clean Air Act (CAA) to promulgate limits on the emission of nitrogen oxides from various electric utility boilers. The U.S. District Court for the District of Columbia Circuit invalidated the first set of these emission limits as exceeding statutory authority in *Alabama Power Co. v. EPA*, 40 F.3d 450 (D.C. Cir. 1994). Appalachian Power challenged the next group of emission limits in this action, which are a more stringent revision of the first group, as well as a new set of limits for a second group of boilers. The D.C. Circuit upheld most of the challenged rule, deferring to the EPA when the rule concerned scientific or technical matters, stating that the EPA had not exceeded its statutory authority. A portion of the rule was vacated for lack of an adequate justification.

The 1990 Amendments to the CAA included Title IV, which was designed to reduce the adverse effects of acid rain deposition by limiting the allowable emissions of nitrogen oxides (NOx). Electric utility companies emit NOx through coal burning. To reduce emissions, coal-fired boilers can be retrofitted with an emission control device. There are several varieties of emission control devices that can be used on Group 1 and Group 2 boilers.

The rule at issue in this case reflects the next set of limits under the statutory scheme: revised NOx limits for Group 1, Phase II boilers, as well as NOx limits for Group 2 boilers. The Group 1 limits were revised after the EPA determined that boilers with low NOx burners were achieving lower emission levels than the limits promulgated in 1995 and, therefore, more effective low NOx burner technology was available. The EPA, in setting Group 2 limits, studied the cost-effectiveness of Group 2 controls and low NOx burner technology and, therefore, promulgated limits for Group 2 boilers based on control technologies that were shown to be cost-effective in reducing NOx emissions as low NOx burner technology. The EPA set the date for compliance at January 1, 2000. Finally, the EPA determined that certain retrofitted cell burner boilers should be reclassified from Group 2 to Group 1, thereby facing stricter limits. Appalachian Power and others appealed these parts of the final rule, arguing that the EPA's actions were arbitrary and capricious and exceeded statutory authority.

The court used *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), to evaluate the EPA's analysis on all of the issues and determined that the rule should be upheld against Appalachian Power's challenge. The court stated that the reason is a statutory one. The EPA is permitted to revise emissions limits upon finding that more effective low NOx burner technology is available. The choice of the term "may" rather than "shall" in the statute suggested that Congress intended to give some discretion to the EPA, and, therefore, the court deferred to the EPA's determination.

On the issue of retrofitted cell burners, the court determined that the EPA had not adequately justified its classification of retrofitted cell burners as wall-fired boilers. The court vacated and remanded the issue to the EPA for further consideration.

In conclusion, the court upheld the EPA's NOx emission limits for the Group 1, Phase II boilers, the emission limits for the Group 2 boilers, and the compliance date of January 1, 2000, as neither exceeding the EPA's statutory authority under Title IV of the CAA nor as arbitrary and capricious. The court vacated the EPA's classification of retrofitted cell burners as wall-fired boilers as arbitrary and capricious and remanded to the EPA for reconsideration or a more adequate explanation.

Allison Gassner

V. HAZARDOUS WASTE

Donahey v. Bogle, 129 F.3d 838 (6th Cir. 1997)

The St. Clair Rubber Company leased a Marysville, Michigan, industrial site from defendant Helen L. Bogle. Defendant Seabourn S. Livingstone owned 100% of St. Clair's stock and served as chairman of the board of directors and treasurer. Yet, while Livingstone possessed the authority to control waste disposal, he only participated in financial aspects of operations.

St. Clair engaged in an environmentally harmful manufacturing process that created a waste product. Cleaning the manufacturing equipment was conducted with a solvent that, when combined with the waste product, created a sludge. The sludge was drained into drums that were transferred to the site. The sludge remained onsite for about one week, then it was burned.

In 1982, plaintiff Richard Donahey and his wife purchased the industrial site on credit. Before Donahey contracted, St. Clair agreed to recondition the site to an environmentally satisfactory state and to indemnify Donahey for costs resulting from St. Clair's dumping. After the Donahey's acquisition, the Michigan Department of Natural Resources required the Donaheys to perform an environmental evaluation. The Donahey's consultant discovered a "swath of gelatinous material." Donahey then sought a clean-up contribution from Bogle, as she owned the site when the polluting occurred. In 1987, Donahey notified Bogle he was going to put future payments in escrow; Bogle responded that she was accelerating the payments due. In 1990, Bogle refused Donahey's tender of quitclaim deeds, and subsequently Donahey ceased payments and abandoned the site.

The Donaheys filed suit in 1987. In 1991, the district court held, *inter alia*, that no party could recover CERCLA response costs and that Livingstone was not a CERCLA operator since he was not engaged in

environmental activities. The Sixth Circuit affirmed in part and reversed in part, holding, *inter alia*, that Livingstone was responsible because he had authority to prevent the pollution. The court granted plaintiffs attorney's fees and response costs and remanded for determination of the amount due. The Supreme Court granted certiorari, vacated the judgment, and remanded for consideration of the attorney's fees issue in light of *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994), which held that attorney's fees are generally not recoverable CERCLA response costs.

Judge Norris's opinion reinstated and reaffirmed the Sixth Circuit's previous decision except as to attorney's fees and CERCLA Section 107(a)(2) operator liability. Judge Norris interpreted *Key Tronic* to only allow attorney's fees where a party takes steps to identify "previously unidentified parties" that potentially bear CERCLA responsibility for the site's pollution. Judge Norris stated that St. Clair was already identified. The Donaheys' actions to identify insurers themselves and not "potentially responsible parties," were not covered by CERCLA.

Judge Norris subsequently extended the Sixth Circuit's en banc decision in *United States v. Cordova Chemical Co.*, 113 F.3d 572 (6th Cir. 1997), which held that a parent corporation is liable as a CERCLA operator for its subsidiary's environmental harms only if the elements of piercing the corporate veil are met. Judge Norris reasoned that since parent corporations and stockholders are treated similarly as to vicarious liability, the *Cordova* standard should be extended to stockholders. Thus, Judge Norris held that circumstances justifying piercing of the corporate veil, which were lacking, must be present for a stockholder to be liable as a CERCLA operator.

David P. Eldridge

Ashoff v. City of Ukiah, 130 F.3d 409 (9th Cir. 1997)

A group of citizens brought an action against the city of Ukiah, California, seeking an injunction on the grounds that the city's solid waste disposal site violated Subtitle D of the Resource Conservation and Recovery Act (RCRA), the Clean Water Act (CWA), and state law. The United States District Court for the Northern District of California dismissed the suit for a lack of subject matter jurisdiction. The district court found that "RCRA did not authorize citizen suits 'in federal court to enforce state regulations authorized under Subtitle D,'" but noted that "Ashoff and the other citizens could file a complaint alleging violations of the federal minimum criteria." The citizens instead filed an appeal on the

RCRA question. The narrow issue before the Ninth Circuit was whether RCRA authorizes citizen suits in federal courts that claim only violations of state standards that exceed the federal minimum criteria.

As an initial matter, the Ninth Circuit examined whether RCRA authorizes citizen suits for violations of federal minimum criteria in federal court once the state adopts the federally mandated program. The court found that citizens can sue in federal courts to enforce these standards because they "become effective pursuant to" RCRA.

The court next examined whether RCRA authorized citizen suits in federal court to enforce state-enacted standards that exceed the federal minimum criteria. The court held that when a state elects to create more stringent standards, nothing in RCRA gives them legal effect. Rather, their legal effect flows solely from state law, and, therefore, the federal district court does not have subject matter jurisdiction over claims based upon them.

Following this ruling, the Ninth Circuit then specifically addressed appellant's four objections to this understanding of the RCRA citizen suit provisions. First, the court summarily dismissed the argument that RCRA frequently gives states the option to adopt more stringent standards and nothing in the statute bars suits based upon such standards. Appellant's argument that limiting citizen suits would run contrary to congressional intent was likewise dismissed, as congressional intent as to this specific issue is simply unclear.

The appellant's third argument stated that citizen suits based on standards exceeding the federal minimum should be allowed in this situation, because such suits have been allowed under the CWA and the Clean Air Act (CAA) (which provide for state delegation in a similar fashion to RCRA). This argument failed because the CWA explicitly calls upon states to create more stringent standards, and the citizen suit provisions of the CWA specifically incorporate orders issued by a state. Similarly, the CAA also explicitly mentions state orders in its citizen suit provisions, as well as standards created by a state program. In contrast, RCRA has no such analogous provisions, therefore, nullifying the appellant's third claim.

The appellant's fourth argument was that limiting claims to those based upon the federal minimum would allow landfill owners to defeat any RCRA citizen suit by arguing that the state standard is more stringent, and it would require the courts to make many technical decisions as to what is "more stringent." The court admitted that the situation was a possibility, but found that it could not outweigh the potential intrusion into state sovereignty or the potential chilling effect such a reading could have on states willingness to adopt more stringent standards.

The Ninth Circuit affirmed the district court ruling, holding that RCRA authorizes citizen suits for violations of federal minimum criteria even after the state has adopted a permit program pursuant to those federal criteria. However, RCRA does not authorize a citizen suit based on state standards that are more stringent than the federal minimum criteria.

Jason Holleman