

COURTHOUSE NEWS

A Summary of Topical Highlights from decisions of the
U.S. District Court for the District of Oregon
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Announcements

Attorneys wishing to use the services of a settlement judge are advised that they need to confer and agree on three possible dates that their schedules are free (including the person with settlement authority). Then, they must inform the assigned judge of their desire for a settlement judge. At that time, the assigned judge contacts all of the judges, seeking volunteers to assist in settlement during one of the three proposed dates. If the parties have a preference for a particular judge, they can so request but there is no guarantee that they will get that judge.

Attorneys are cautioned that they should not attempt to contact chambers directly when seeking settlement judges.

7 Judge Malcolm F. Marsh has issued a revised version of his Notebook, "Sentencing Guidelines: Recent Ninth Circuit Case Law Addressing Selected Frequently Raised Sentencing Issues." Copies of the new edition are available on the court's website at www.ord.uscourts.gov

Environment

Plaintiffs moved for a temporary restraining order and preliminary injunction pending a final adjudication on the merits of its action to invalidate a biological opinion issued by defendant Fish and Wildlife Service (AFWS@) which concluded that there would be **Ano jeopardy@** to bull trout, an endangered species under the Endangered Species Act (AESAs@), arising from the Forest Service's implementation of four timber sales in the Willamette National Forest. The FWS did not authorize an **Aincidental take@** of bull trout as a result of the sales. Plaintiffs assert that bull trout will be jeopardized by the accumulation of fine sediment resulting from the construction, reconstruction, and use of roads during the timber sales. Plaintiffs contend that the FWS: (1) failed to insure that the timber sales will comply with the Aquatic Conservation Strategy (AACs@) objectives in the 1994 Northwest Forest Plan; (2) failed to use the best available scientific evidence in determining impacts of the timber sales to the bull trout; and

(3) failed to analyze cumulative impacts from timber-related activities on private land in the same watershed. The FWS contends that the court lacks subject matter jurisdiction because its biological opinion is not a final agency action. It further contends that the opinion was not arbitrary and capricious because: (1) it was the responsibility of the Forest Service, not the FWS, to insure compliance with ACS objectives, and (2) bull trout and bull trout habitat are not in the vicinity of the timber sales. Judge James A. Redden held that a **Ano jeopardy@** finding, which, however, did not authorize a take, is a final agency action which is subject to judicial review because the opinion: (1) concludes the consultation process required of the Forest Service and the FWS under the ESA; and (2) carries with it appreciable legal consequences, by providing a potential defense to the Forest Service if the sales cause a take of bull trout, resulting in civil or criminal proceedings against the Forest Service under the ESA, even though no take was authorized.

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On the merits, Judge Redden held that there are serious questions as to whether the FWS acted arbitrarily and capriciously in failing to analyze the timber sales= consistency with ACS objectives. In a programmatic biological opinion issued in 2000, regarding the impact of the Forest Plan on bull trout, the FWS concluded that there would be no jeopardy to bull trout from timber sales which are consistent with the ACS objectives in the Forest Plan. In the biological opinion at issue, however, the FWS made no analysis of ACS consistency, particularly with regard to a likely short-term degrade in the watershed arising from road construction, reconstruction and use. Judge Redden also held that there are serious questions whether the FWS considered all relevant factors and articulated a rational connection between its findings regarding the location of bull trout and proximity of bull trout habitat to timber sales sites, and its conclusion that bull trout and its habitat are not found in the vicinity of those timber sales. Judge Redden found that, pursuant to the ESA, the balance of hardships and public interest tipped in favor of the bull trout. Judge Redden granted plaintiffs= motion for a temporary restraining order and preliminary injunction

pending final resolution by summary judgment motions. Cascadia Wildlands Project, et al. v. United States Fish and Wildlife Service, CV 02 - 747-RE (Opinion, August 7, 2002).

Plaintiffs= Counsel:

Christopher G. Winter

Defense Counsel:

S. Jay Govindan

Criminal Law

Judge Anna J. Brown granted the government's motion to dismiss a prosecution without prejudice and denied several defense motions to dismiss the action with prejudice. The court rejected defendants' arguments that dismissal with prejudice under Rule 48 was warranted based upon bad faith of the prosecutors or outrageous government conduct. United States v. Adamidov, CR 01-72-BR (Opinion, Sept. 4, 2002).

AUSA: Michael J. Brown

Defense: Jack Ransom;

Steven T. Wax

Torts

A federal prison inmate filed an action against several prison doctors and a medical records supervisor asserting numerous claims under the FTCA and Bivens. Plaintiff was injured while working in the prison

kitchen. Plaintiff claimed that he received inadequate medical treatment resulting in deliberate indifference to his medical needs in violation of the 8th Amendment and that the medical records custodian failed to provide a copy of his records upon his release from custody, delaying his ability to obtain competent private medical treatment.

Judge Anna J. Brown granted a defense motion to dismiss claims against the doctors based upon the exclusive remedy provided by the Inmate Worker's Compensation Act. The court held that the government was not liable for work related injuries regardless of whether those injuries were the result of negligence, deliberate indifference or intentional conduct. The court denied a motion to dismiss claims against the records custodian, rejecting the FTCA discretionary function exception defense and defendant's argument that the Bivens claim should be barred by the PLRA exhaustion requirement. Knaeble v. Nelson, CV 01-784-BR (Opinion, May 29, 2002).

Plaintiff's Counsel:

Thomas C. Thetford

Defense Counsel:

Kenneth C. Bauman