

Statements from the Ninth Circuit Court of Appeals

Clarification of Environmental Jurisprudence

With Respect to the Court's Review of the Actions of the United States Forest Service

July 2, 2008

No. 07-35000

D.C. No. CV-06-00425-EJL

The Ninth Circuit Court of Appeals recently issued a landmark decision regarding judicial intervention in the actions of the Forest Service. Mark Rey, the Undersecretary of Agriculture, called it the most significant environmental court decision for the Forest Service in 20 years. The Court issued the decision "to clarify some of our environmental jurisprudence with respect to our review of the actions of the United States Forest Service." That clarification involved the Court's admission that it had consistently reviewed the Forest Service's environmental analysis of the impacts of proposed projects in an improper manner. In a self-administered review of itself, the court stated the following:

- "In essence, [plaintiff] asks this court to act as a panel of scientists that instructs the Forest Service how to validate its hypotheses regarding wildlife viability, chooses among scientific studies in determining whether the Forest Service has complied with the underlying Forest Plan, and orders the agency to explain every possible scientific uncertainty. As we will explain, this is not a proper role for a federal appellate court. But [plaintiff's] arguments illustrate how, in recent years, our environmental jurisprudence has, at times, shifted away from the appropriate standard of review and could be read to suggest that this court should play such a role."
- "Congress has consistently acknowledged that the Forest Service must balance competing demands in managing National Forest System lands. Indeed, since Congress' early regulation of the national forests, it has never been the case that 'the national forests were ... to be 'set aside for non-use.' "
- "Congress' current vision of national forest uses, a broader view than Congress articulated in 1897, is expressed in the Multiple-Use Sustained Yield Act of 1960, [] which states that "[i]t is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." [] The NFMA [] requires that plans developed for units of the National Forest System "provide for multiple use and sustained yield of the products and services obtained therefrom ... and [must] include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness[.]" Thus, the NFMA is explicit that wildlife viability is not the Forest Service's only consideration when developing site-specific plans for National Forest System lands."
- "We made three key errors in [our prior holding in] *Ecology Center*. First, we read the holding of *Lands Council I* too broadly. Second, we created a requirement not found in any relevant statute or regulation. And, third, we defied well-established law concerning the deference we owe to agencies and their methodological choices. Today, we correct those errors."

- “Essentially, we assessed the quality and detail of [Forest Service’s] on-site analysis [in *Ecology Center*] and made ‘fine-grained judgments of its worth.’ [] It is not our proper role to conduct such an assessment.”
- “Finally, this approach also acknowledges that ‘[w]e are not free to ‘impose on the agency [our] own notion of which procedures are ‘best’ or most likely to further some vague, undefined public good.’ ”
- “We have previously faulted the Forest Service for not addressing uncertainties relating to a project ‘in any meaningful way’ in an EIS.[] But none of NEPA’s statutory provisions or regulations requires the Forest Service to affirmatively present every uncertainty in its EIS. Thus, we hold that to the extent our case law suggests that a NEPA violation occurs every time the Forest Service does not affirmatively address an uncertainty in the EIS, we have erred. [] After all, to require the Forest Service to affirmatively present every uncertainty in its EIS would be an onerous requirement, given that experts in every scientific field routinely disagree; such a requirement might inadvertently prevent the Forest Service from acting due to the burden it would impose.’
- “To always require a particular type of proof that a project would maintain a species’ population in a specific area would inhibit the Forest Service from conducting projects in the National Forests. We decline to constrain the Forest Service in this fashion. Were we to do so, we may well be complicit in frustrating one or more of the other objectives the Forest Service must also try to achieve as it manages National Forest System lands. See 16 U.S.C. § 528 (noting Congress’ policy that the National Forests are to be ‘administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes’).”
- “Our law does not, however, allow us to abandon a balance of harms analysis just because a potential environmental injury is at issue. . . . Indeed, the Supreme Court has instructed us not to ‘exercise [our] equitable powers loosely or casually whenever a claim of ‘environmental damage’ is asserted.”
- “Intervenors raise hardships that must be balanced against Lands Council’s claims of potential environmental injury. Intervenors contend that enjoining the project will force the timber companies that purchased the Sales to lay off some or all of their twenty-seven workers, in addition to other indirect harm to the struggling local economy. We must also consider the public’s interest. [] Though preserving environmental resources is certainly in the public’s interest, the Project benefits the public’s interest in a variety of other ways. According to the Forest Service, the Project will decrease the risk of catastrophic fire, insect infestation, and disease, and further the public’s interest in aiding the struggling local economy and preventing job loss. [] The court did not clearly error in concluding that the balance of harms did not tip sharply in Lands Council’s favor.”

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