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Lands Council v. McNair, No. 07-35000

Opinion Filed: 07/02/2008

En Banc Court: ALEX KOZINSKI, Chief Judge, PAMELA ANN RYMER, ANDREW J. KLEINFELD, MICHAEL DALY HAWKINS, BARRY G. SILVERMAN, M. MARGARET MCKEOWN, RAYMOND C. FISHER, MARSHA S. BERZON, RICHARD R. CLIFTON, MILAN D. SMITH, JR., and N. RANDY SMITH, Circuit Judges.

The Lands Council and Wild West Institute (collectively “Lands Council”) appealed District Judge Lodge’s denial of their request for a preliminary injunction in their action against the United States Forest Service and federal officials. Lands Council sought to halt the Mission Brush Project (the Project), which called for the selective logging of 3,829 acres of forest in the Idaho Panhandle National Forest (“IPNF”), alleging that Ranotta McNair, Forest Supervisor for the IPNF and the Forest Service (collectively “Forest Service”) violated the National Environmental Policy Act (“NEPA”), the National Forest Management Act (“NMFA”) and the Administrative Procedure Act (“APA”).

In the decision, written by Judge Milan D. Smith, Jr, and filed today, the unanimous en banc court stated that it took the case en banc to clarify some of the court’s environmental jurisprudence with respect to its review of the Forest Service’s actions. The en banc court affirmed the district court’s denial of Lands Council’s request for a preliminary injunction, concluding that Lands Council was not likely to succeed on any of its claims under the NFMA or NEPA, and that Lands Council had not shown that the balance of hardships would tip sharply in its favor if the court allowed the Forest Service to proceed with the Project.

The court found that it is not appropriate for a federal appellate court to act like 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.

The court reaffirmed that the Forest Service must fully comply with the requirements of the NFMA, which sets forth the statutory framework and specifies the procedural and substantive requirements under which the Forest Service is to manage National Forest System lands, and NEPA, but concluded that the Forest Service did comply with those requirements in this case.

Overruling *Ecology Center, Inc. v. Austin*, 430 F.3d 1057 (9th Cir. 2005) (requiring the Forest Service to demonstrate the reliability of its scientific methodology or hypotheses with on-the-ground analysis), the court held that the Forest Service must rather support its conclusions that a project meets the requirements of the NFMA and Forest Plan with evidence that the agency deems reliable, and must explain its conclusions and the reasons it considers underlying evidence to be reliable. The court held that it will find that the Forest Service acted arbitrarily and capriciously only when the record plainly demonstrates that the Forest Service made a clear error in judgment.

The court further held that on the basis of the studies provided by the Forest Service, and its reasonable assumption that maintaining suitable habitat for the flammulated owl will also maintain a viable population of flammulated owls in the Mission Brush Area, the district court did not abuse its discretion in deciding that Lands Council was not likely to succeed on its NFMA claim.

Lands Council claimed that the Forest Service also violated NEPA in failing to adequately address the uncertainty regarding its strategy for species viability in the Project. The court held that, to the extent the court's case law has suggested that a NEPA violation occurs every time the Forest Service does not affirmatively address an uncertainty in an Environmental Impact Statement, the court has erred. The court reaffirmed that the Forest Service must acknowledge and respond to comments by outside parties raising significant scientific uncertainties, but stated that the Forest Service does not have the burden to anticipate questions not necessary to its analysis, nor to respond to uncertainties not reasonably supported by scientific authority. The court also held that, in this case, the Forest Service took the requisite "hard look" at the environmental impacts of the Project to satisfy NEPA, and that the district court thus did not abuse its discretion in concluding that Lands Council was unlikely to succeed on the merits of its NEPA claim.

Weighing the environmental injuries invoked by Lands Council, the loss of trees and risk to the flammulated owl, against injuries identified by the Forest Service and Intervenors, economic losses, particularly the loss of jobs and harm to the local economy, and the risks from no action, including catastrophic fire, insect infestation, and disease, the en banc court held that the district court did not clearly err in concluding that the balance of harms did not tip sharply in Lands Council's favor.

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