

***Lands Council v. McNair*, No. 07-35000 (9th Cir. July 2, 2008) (en banc affirmance of district court's denial of PI) Mission Brush Project, Idaho Panhandle NF**

The Ninth Circuit vacated its (July 2, 2007) decision and affirmed the district court's denial of a preliminary injunction of the Project. In doing so, the court "clarif[ied] some of our environmental jurisprudence with respect to our review of the actions of the United States Forest Service" (Slip Opinion at 2). Explicitly overruling *Ecology Center v. Austin*, the court deferred to the Forest Service's judgment regarding the project analysis necessary to demonstrate compliance with NFMA and NEPA.

The Core Message of the case - Deference to agency judgment

Reducing the issues to their essence, the court ruled that "to act as a panel of scientists that instructs the Forest Service how to validate its hypotheses . . . , chooses among scientific studies . . . , and orders the agency to explain every possible scientific uncertainty. . . . is not a proper role for a federal appellate court. . . . [I]n recent years, our environmental jurisprudence has, at time, shifted away from the appropriate standard of review and could be read to suggest that this court should play such a role." Opinion at 12. The court here rules that "[O]ur proper role is simply to ensure that the Forest Service made no 'clear error of judgment' that would render its action 'arbitrary and capricious.'" Opinion at 24. Deference to an agency's predictive judgments is particularly owing in matters involving a "high level of expertise."

How to show compliance with NFMA and Forest Plan -

Under the correct standard of judicial review, the Forest Service need only support its conclusions that a project will meet NFMA and Forest Plan requirements "with studies that the agency in its expertise, deems reliable." The agency must explain its conclusions, and state its reasons for deeming its evidence reliable. Opinion at 26.

Where the court had earlier gone wrong -

In overruling *Ecology Center v. Austin*, the court held there was no categorical requirement under NFMA or NEPA for any specific type of analysis. Opinion at 20. In *Ecology Center*, the court erroneously expanded upon its earlier decision in *Lands Council v. Powell* which, in requiring on-the-ground soils analysis, had been intended to be limited to its specific facts. *Ecology Center* had "created a requirement not found in any relevant statute or regulation" and "defied well-established law concerning the deference we owe to agencies and their methodological choices." Opinion at 20.

Specific Issues in the Case -

With respect to the specific issue of the Project's effects on flammulated owls, the court ruled that the record supported the Forest Service's "eminently reasonable" conclusion that the project will maintain a viable population. Wildlife viability requirements may be met by preserving habitat, where the Forest Service's knowledge of the type of habitat that is necessary and the method for measuring it are "reasonably reliable and accurate." Opinion at 37. Furthermore, "appreciable habitat disturbance" alone does not preclude use of habitat by proxy. Opinion at 34-35.

With respect to compliance with the Forest Plan standard for maintaining old growth, the court

upheld the Forest Service's discretion to rely on its experts instead of Plaintiffs'.

NEPA ruling - when to consider scientific uncertainty -

In its NEPA rulings that court held that neither NEPA nor its regulation require that an EIS disclose every scientific uncertainty - "such would be an onerous requirement, given that experts in every scientific field routinely disagree," perhaps to the point that the agency could not act. Opinion at 44. The agency must, however, acknowledge and respond to comments that raise significant scientific uncertainties and reasonably support that such uncertainties exist." Opinion at 44. With respect to specific articles that Plaintiffs claim raised uncertainties, on the whole they supported the proposed action, and the EIS therefore was not deficient for not including a discussion of them.

Plaintiffs did not show it met requirements for preliminary injunction -

Applying the standards for preliminary injunctive relief, the court held that the Plaintiffs have not shown a likelihood of success nor the possibility of irreparable injury. Regarding the latter, the court "decline[s] to adopt a rule that any potential environmental injury automatically merits an injunction, particularly where . . . we have determined that the plaintiffs are not likely to succeed on the merits of their claims." Opinion at 54. Further, environmental harm does not inevitably outweigh other harms - here, economic harm to the timber purchasers, and the risk of catastrophic fire, insect infestation, and disease.

Other notable statements and rulings by the court -

- national forests are for multiple use, not "non-use" and NFMA is explicit that "wildlife viability is not the Forest Service's only consideration when developing site-specific plans [i.e., projects]" (Opinion at 16) (note, however that the word "viability" does not occur in NFMA);
- the 1982 planning regulation does not apply to the Project (Opinion at footnote 5);
- neither NFMA nor the specific Forest Plan involved in this case (Idaho Panhandle LRMP) require *improvement* of habitat (Opinion at footnote 7, and p.30).