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***Lands Council v. McNair*,
537 F.3d 981 (9th Cir. 2008)**

Camisha Sawtelle

INTRODUCTION

*Lands Council v. McNair*¹ shows a shift in the approach of the United States Court of Appeals for the Ninth Circuit in reviewing United States Forest Service (Forest Service) actions. Prior to this decision, courts strictly scrutinized Forest Service methods and use of scientific data in developing and implementing management plans. This decision came after almost a decade of decisions consistently holding the Forest Service violated the National Environmental Policy Act (NEPA),² the National Forest Management Act (NFMA),³ and the Administrative Procedure Act (APA)⁴ by using unreliable scientific data and methodology and inadequate habitat analysis for indicator species. The court's decision in *Lands Council v. McNair* marks a step back towards deference to the agency experts.

FACTUAL BACKGROUND

The Mission Brush Project (Project Area) at issue in *Lands Council v. McNair* is located in the Bonners Ferry Ranger District of northern Idaho and includes over 31,000 acres of land.⁵ Over half of the Project Area is located on National Forest land.⁶ The region is home to a variety of species including: the northern gray wolf, Canada lynx, grizzly bear, black-backed woodpecker, flammulated owl, fisher, western toad, pileated woodpecker, and the white-tailed deer.⁷ The Project Area is also home to old-growth trees.⁸ The composition of the forest in the Mission Brush Project area is significantly different than its historical composition.⁹ As a result of fire suppression, past logging activities, and disease, the once open Ponderosa pine forest gradually changed into a crowded forest dominated by Douglas fir.¹⁰ This composition left the Project Area susceptible to disease and potentially catastrophic fire. As a result, the Forest Service proposed a logging project which resulted in this suit. The Forest Service issued a Supplemental Final Environmental Impact Statement (SFEIS) in April 2006

1. *Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008).

2. 42 U.S.C. §§ 4321-4370 (2006).

3. 16 U.S.C. §§ 1600-1614.

4. 5 U.S.C. §§ 701-706.

5. *Lands Council*, 537 F.3d at 984.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 985.

10. *Id.*

with the overall objectives of “restoring forest health and wildlife habitat, improving water quality and overall aquatic habitat by reducing sediment and the risk of sediment reaching streams, and providing recreation opportunities that meet the varied desires of the public and the agency while reducing negative effects to the ecosystem.”¹¹ After considering several alternatives, the Forest Service decided on a plan calling for silvicultural treatments on 3,829 acres of forest, fuels treatments on 3,698 acres, and ecosystem burns without harvest on 238 acres. Timber harvest methods included both even-aged and uneven-aged regeneration cuts. Although there were planned cuts in old-growth stands, there were no plans to harvest old-growth trees.¹²

PROCEDURAL BACKGROUND

Forest Service management in the Mission Brush Project Area began in 2003, with the issuance of a draft Environmental Impact Statement (EIS) for the Mission Brush Project. After the required public comment period, the Forest Service released its final EIS and Record of Decision (ROD) in 2004.¹³ Lands Council appealed the ROD.

At the same time, Lands Council was involved in litigation over a different Forest Service project in the Idaho Panhandle National Forest. In 2004, the Ninth Circuit issued an opinion in *Lands Council v. Powell*.¹⁴ In *Powell*, the court held that the Forest Service was required to demonstrate the validity of its scientific methodology. Specifically, the Forest Service was required to conduct on-site spot verification of soil types.¹⁵ The *Powell* decision was consistent with a trend in Ninth Circuit decisions regarding increased scrutiny of Forest Service management actions. For example, in the 1998 case *Idaho Sporting Congress v. Thomas*, the court questioned the use of forest community types, defined by the size, species, and age of trees, as proxies for the abundance or viability of wildlife populations.¹⁶ In *Thomas*, the court stated that habitat cannot be used as a proxy for species health when there is an appreciable habitat disturbance.¹⁷ This statement was significant because it suggested that a planned disturbance, such as a logging project, would preclude the Forest Service from using habitat as a proxy approach to establish species viability, which meant additional work for the Forest Service.¹⁸

11. *Id.*

12. *Id.*

13. *Id.* at 986.

14. *Lands Council v. Powell*, 379 F.3d 738 (9th Cir. 2004).

15. *Id.* at 754.

16. *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1153 (9th Cir. 1998).

17. *Id.* at 1154.

18. *Id.*

In response to the decision in *Powell*, the Forest Service in the Mission Brush Project released a supplemental draft EIS for public comment followed with a SFEIS and ROD in April 2006. In the mean time, however, the Ninth Circuit decided *Ecology Center v. Austin*, another relevant case.¹⁹ The decision in *Austin* regarded a proposed logging project on the Lolo National Forest.²⁰ The Ninth Circuit held the Forest Service violated NFMA and NEPA in failing to conduct on-the-ground testing of soil conditions.²¹ The holding in *Austin* was significant in that it extended the holding in *Powell* and established a far-reaching rule that the Forest Service must always verify its methodology with on-the-ground analysis, regardless of the context.²²

With successful recent challenges to Forest Service planning decisions, Lands Council and other environmental groups filed an administrative appeal of the Mission Brush Project. The Forest Service denied the appeal in July 2006. In October 2006, Lands Council filed a complaint and moved for a preliminary injunction to halt logging on the Mission Brush Project.²³ The claim alleged that the Forest Service failed to comply with NFMA, NEPA, and APA in developing and implementing the Project. Lands Council based its NFMA claims on the Forest Service's failure to demonstrate the reliability of the scientific methodology used to determine the Project's effect on wildlife – specifically, the flammulated owl indicator species.²⁴ The claim further alleged that the Forest Service was not complying with the Idaho Panhandle National Forest Plan requirement of maintaining at least ten percent old-growth forest.²⁵ The alleged NEPA violation was related to the lack of certainty in maintaining species viability with the proposed treatments.²⁶

The district court denied Lands Council's motion for a preliminary injunction.²⁷ At the Ninth Circuit, a three-judge panel reversed the district court's decision and remanded for entry of a preliminary injunction which limited or prohibited logging in areas of the Project.²⁸ With the intention of clarifying “some of the environmental jurisprudence with respect to review of the United States Forest Service's actions,” the Ninth Circuit took this case en banc.²⁹

19. *Ecology Center v. Austin*, 430 F.3d 1057 (9th Cir. 2005).

20. *Id.* at 1061.

21. *Id.* at 1071.

22. *Id.*

23. *Lands Council*, 537 F.3d at 986.

24. *Id.* at 987.

25. *Id.* at 987-88.

26. *Id.* at 988.

27. *Id.* at 984.

28. *Id.*

29. *Id.*

NINTH CIRCUIT'S DECISION

The Ninth Circuit (en banc) vacated the decision of the three-judge panel, removed the injunction, and affirmed the district court's decision.³⁰ The court addressed each of Lands Council's issues in turn. Ultimately, it rejected the role of the court as a scientist with the job of instructing the Forest Service on how manage its land.

Lands Council based its NFMA argument on alleged uncertainty regarding the methods used to ensure viability of the indicator species, the flammulated owl.³¹ It relied primarily on *Ecology Center*, contending the Forest Service erred by not verifying its predicted treatment impacts with observation or on-the-ground analysis. The court responded by overruling *Ecology Center*.³² The court pointed to three errors in *Ecology Center*. First, previous courts had read the holdings in the earlier decisions too broadly. Second, the requirement of on the ground verification was not found in any relevant statute or regulation. Finally, *Ecology Center* defied the well-established rule of deference to agencies and their methodological choices.³³ The court clarified that in some instances on-the-ground verification may be appropriate, but noted NFMA does not specify how the Forest Service should demonstrate habitat viability exists.³⁴ Instead, the court suggested the future role of the courts will be not to question agency science, but rather to ensure that there is no clear error in judgment regarding the requirements of NFMA in addition to the forest plan that would make the action arbitrary and capricious.³⁵

The Ninth Circuit also utilized the arbitrary and capricious standard in upholding the use of a proxy approach to establish species viability.³⁶ The court clarified (and partially overruled) the holding in *Idaho Sporting Congress* to the extent it suggested habitat disturbance prevented use of the proxy method.³⁷ Here, the court confirmed species viability is not always threatened by habitat disturbance. The proposed logging activity would disturb the habitat of the flammulated owl, but enough suitable habitat would remain to allow the owl to retain its current distribution and species viability. Therefore, the planned habitat disturbance did not preclude the Forest Service from using the habitat as a proxy approach to establish a species' viability when the disturbance does not reduce the suitable habitat in a way that threatens that species' viability.³⁸ The court reiterated that a

30. *Id.*

31. *Id.* at 990.

32. *Id.*

33. *Id.* at 991.

34. *Id.* at 991-92.

35. *Id.* at 993.

36. *Id.* at 997.

37. *Lands Council*, 537 F.3d at 997.

38. *Id.*