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Southern Four Wheel Drive Ass'n v. U.S. Forest Serv.

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Southern Four Wheel Drive Ass'n v. U.S. Forest Serv., 2012 WL 4106427 (W.D.N.C. Sept. 19, 2012).

William Fanning

ABSTRACT

The United States District Court for the Western District of North Carolina determined the Nantahala National Forest properly amended the Forest Plan to prohibit and restrict vehicular access to the Upper Tellico Off Highway Vehicle System. On summary judgment, the court found the Forest Service followed the appropriate procedures in deciding that erosion and sedimentation related to off-roading were imperiling the native brook trout.

I. INTRODUCTION

In *Southern Four Wheel Drive Association v. United States Forest Service*,¹ a group of off-road vehicle enthusiasts appealed a final agency decision closing approximately 27 miles of a trail system in the Nantahala National Forest to vehicular access.² The group claimed the Forest Service's decision violated the National Forest Management Act ("NFMA"), the National Environmental Policy Act ("NEPA"), and the Administrative Procedures Act ("APA").³ APA standards require the court to conduct a "highly deferential inquiry" and set aside agency decisions the court finds to be arbitrary, capricious, or an abuse of discretion.⁴

II. FACTUAL BACKGROUND

In 1980, the Forest Service acquired former logging lands in Cherokee County, North Carolina containing both the headwaters of the Tellico River and many miles of off-road jeep

¹ 2012 WL 4106427 (W.D.N.C. Sept. 19, 2012).

² *Id.* at *1.

³ *Id.*

⁴ *Id.* at *2 (citing 5 U.S.C.A. § 706).

trails.⁵ The Nantahala National Forest (Forest) closed trails that were environmentally unacceptable and maintained forty miles of trails for off-road vehicles as part of the Upper Tellico OHV (Off Highway Vehicle) System (“System”).⁶ This area receives more than 80 inches of rain per year, and the North Carolina Wildlife Resources Commission (“NCWRC”) has classified the soils of the Tellico watershed as a “severe erosion hazard and poorly suited for dirt roads.”⁷ The erosion of the roads created more challenging terrain for drivers which in turn made the area more popular. By 2006, 1,986 vehicles were using the system per month.⁸

II. PROCEDURAL BACKGROUND

A 2005 comprehensive assessment by the Forest Service noted higher concentrations of suspended sediment and lower trout densities in the areas with OHV trails.⁹ In 2007, the NCWRC found reproductive failure among trout occurring in 50 percent of the Tellico River and an absence of trout less than one year old in the OHV area.¹⁰ Trout Unlimited, Trails Unlimited, a subdivision of the Forest Service, and the Southern Four Wheel Drive Association met with the Forest Service throughout 2007 in order to resolve these conflicts.¹¹ Ultimately, in December of 2007, the Forest Supervisor enacted temporary and seasonal closures of the system.¹² She decided that closures created no significant effects on the quality of the human environment and there were no extraordinary circumstances that warranted an Environmental Assessment (“EA”) or Environmental Impact Statement (“EIS”).¹³ In May of 2007, some of the same plaintiffs in

⁵ *Id.* at *3.

⁶ *Id.*

⁷ *Southern Four Wheel Drive Ass’n.*, 2012 WL 4106427 at *3.

⁸ *Id.*

⁹ *Id.* at *4.

¹⁰ *Id.*

¹¹ *Id.* at *5.

¹² *Id.* at *6.

¹³ *Southern Four Wheel Drive Ass’n.*, 2012 WL 4106427 at *6.

this case brought a lawsuit challenging the closure, but stipulated to a dismissal awaiting a final decision.¹⁴ On October 14, 2009, the Forest Service issued its final EA and Decision Notice. The Forest Service determined to close the System to all OHV traffic except for 13 miles, which would remain open to street legal vehicles. The remainder of the trails would eventually open to foot travel.¹⁵ The plaintiffs brought this suit alleging the Forest Service failed to comply with the NFMA and NEPA.¹⁶ After a mediated settlement conference proved unsuccessful, both parties moved for summary judgment.¹⁷

III. ANALYSIS

Under the APA, the district court's role in reviewing agency action is not to resolve facts, but rather to determine as a matter of law whether the action is supported by the administrative record and is consistent with APA standards of review.¹⁸

The plaintiffs charged the Forest Service with: A) predetermining the outcome of studies, B) violating NEPA procedures, C) acting arbitrarily and capriciously, and D) tailoring its decision to accommodate the whims of the Forest Supervisor.

A) The plaintiffs argued the Forest Service predetermined the outcome because the December 18, 2007 order enacting temporary and seasonal closures was in fact the final determination to close the Tellico OHV System.¹⁹ The court held plaintiffs were estopped from asserting the temporary closure was final action because the plaintiffs had filed and then stipulated to a dismissal of the May 2007 lawsuit on the basis that the Forest Service had not taken any final agency action.²⁰ Although plaintiffs argued the Forest Supervisor had

¹⁴ *Id.* at *6.

¹⁵ *Id.* at **7-8.

¹⁶ *Id.* at *8.

¹⁷ *Id.* at *1.

¹⁸ *Id.* at *2.

¹⁹ *Southern Four Wheel Drive Ass'n.*, 2012 WL 4106427 at *8.

²⁰ *Id.*

predetermined the outcome before completing the NEPA process, they did not actually challenge the Forest Supervisor's conclusion that neither an EA nor an EIS was required for the final closure, and this claim was rejected.²¹ In regard to speculation about the Supervisor's motives, the court cited *National Audubon Society v. Department of Navy*: "courts should not conduct far-flung investigations into the subjective intent of an agency . . . the test for NEPA compliance is one of good faith objectivity rather than subjective impartiality."²²

The plaintiffs' allegations of Forest Service NEPA violations have three components: improper reliance on aquatic insect studies, reliance on an EA rather than an EIS, and improper amendment of the Forest Plan. According to the court, the plaintiffs' argument that the Forest Service's EA improperly relied on and misinterpreted insect studies which were not made public, failed on three levels:²³ First, the NEPA standard that applies to an EA only requires agencies to involve the public "to the extent practicable," and not to the heightened threshold for an EIS.²⁴ The Forest Service met this standard when it invited public comment on the Predecisional Environmental Assessment which included reference to an aquatic insect community study showing general species diversity among all sites.²⁵ The court accepted the Forest Service's conclusion that aquatic insects are in general, "poor indicators of ecosystem stress due to sedimentation," and did not rely on them.²⁶ The court concluded the record simply did not support the plaintiffs' contentions that the Forest Service violated NEPA.²⁷

²¹ *Id.* *9.

²² *Id.* *9 (citing *National Audubon Society v. Department of Navy* 422 F.3d 174, 198 (4th Cir. 2005)).

²³ *Southern Four Wheel Drive Ass'n.*, 2012 WL 4106427 at *10.

²⁴ *Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257, 1279 (10th Cir.2004) (citing 40 C.F.R. 1501.4(b)).

²⁵ *Southern Four Wheel Drive Ass'n.*, 2012 WL 4106427 at *11.

²⁶ *Id.*

²⁷ *Id.* at *12.

The plaintiffs alleged that the decision to follow the EA with a finding of no significant impact (FONSI), instead of an EIS, was an arbitrary and capricious procedural error.²⁸ An EIS is only required when proposed major federal action will significantly affect the quality of the environment.²⁹ Here, plaintiffs claimed an EIS is required “any time agency action will have a consequence on the public’s use of a public resource.”³⁰ The court deemed this interpretation so broad as to render the regulation essentially meaningless.³¹ Furthermore, the Forest Supervisor in considering the effects of closing the System, found no significant effects on the quality of the human environment and limited local, economic, and social effects.³² The court found the Supervisor’s conclusion, that closing the system would not have any significant adverse effects, to be reasonable and thorough; not arbitrary and capricious as the plaintiffs charged.³³

B) The plaintiffs argued that the Forest Service violated NEPA procedures when it amended the Forest Plan to remove the OHV System.³⁴ Specifically, the plaintiffs alleged that amending the Forest Plan was “significant” and thus required an EIS.³⁵ The court notes that determination of an amendment’s significance is a discretionary determination the Forest Service makes after examining four factors: timing, location and size; goals; objectives and outputs.³⁶ Here the plaintiffs claimed the Supervisor considered only two of the factors, but did not even bother to identify which ones.³⁷ The court cited to the findings of fact and identified all four

²⁸ *Id.* at *14.

²⁹ *Id.* at *12, citing *Save Our Cumberland Mountains v. Kempthorne*, 453 F.3d 334, 338 (6th Cir.2006).

³⁰ *Id.* at *13

³¹ *Southern Four Wheel Drive Ass’n.*, 2012 WL 4106427 at *13.

³² *Id.* at *14.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Southern Four Wheel Drive Ass’n.*, 2012 WL 4106427 at *15.

factors in the Supervisor's decision; once more the court found her decision to be well supported by the record and held the Forest Service did not violate NEPA's procedural requirements.³⁸

C) The plaintiffs' accused the Forest Service of acting arbitrarily and capriciously by concluding runoff from the eroded OHV trails violated North Carolina standards for turbidity in trout waters.³⁹ Here, the court reiterated the deferential standard it adopted above, declaring it was not in the business of second guessing an agency's scientific decisions even when the record showed two very different interpretations; in this case the meaning of turbidity levels measured against natural background conditions.⁴⁰ Plaintiff's argued that background conditions should not include turbidity during run-off events, but the court did not agree. The Forest Service's interpretation was not arbitrary and capricious because its method of comparing turbidity levels in undisturbed areas with those in the OHV area was sound and showed a link between the trails and increased turbidity in the area streams.⁴¹ Further, the court said run-off events are exactly the sort of natural conditions "contemplated in the regulation."⁴²

D) Finally, the plaintiffs charged that the Forest Service tailored its decision to accommodate a subjective statement made by the Supervisor when she expressed her obligation to protect brook trout.⁴³ According to the plaintiffs, this meant that she was unwilling to consider the system for multiple uses.⁴⁴ The court would not "divin[e] the alleged subjective intent of agency personnel;" rather it concluded the Supervisor had met the NEPA standards of "good faith objectivity rather than subjective impartiality" because she acted to comply with the

³⁸ *Id.* at *15.

³⁹ *Id.*

⁴⁰ *Id.* at *17.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Southern Four Wheel Drive Ass'n.*, 2012 WL 4106427 at *18.

⁴⁴ *Id.*

law.⁴⁵ Thus the Forest Service's decision was neither arbitrary nor capricious. The defendants were entitled to judgment as a matter of law on all counts, and the decision to close the Tellico OHV stood.

IV. CONCLUSION

The United States District Court for the Western District of North Carolina found the Forest Service properly amended the Forest Plan to exclude vehicles from erosion prone areas of the Nantahala National Forest. This case illustrates how careful pleading of detailed allegations is essential to a good APA suit, especially at summary judgment. The court took pains to show where plaintiffs used the wrong standards, did not apply the correct tests, and made allegations unsupported by argument. These gaffes allowed the court to dismiss many of the plaintiffs' charges on procedural grounds without even reaching the merits. However, when the court did reach the merits, it found little substance to support the plaintiffs' allegations.

⁴⁵ *Id.* at *19.