

National Forest Law Newsletter

by Ryan Woody

<http://www.nationalforestlawblog.com>



April 2008

This monthly electronic newsletter is a service provided by Attorney Ryan L. Woody for the benefit of clients and forest stakeholders. The vagaries and complexity of the laws and current issues in National Forest Management have, for many lawyers, and professionals alike, made keeping current laws an arduous and laborious task. It is the goal of this electronic newsletter to assist in the dissemination of new legal developments as they occur within the National Forests. If anyone has co-workers, associates or other individuals who wish to be placed on this e-mail mailing list, please provide their e-mail addresses to Ryan Woody at rwoody@mwl-law.com. I appreciate your friendship and your business.

IN THIS ISSUE

Case Notes

Superior National Forest Plan Litigation Nears an End	1
9 th Circuit En Banc Hearing in Lands Council Looks to Reverse	2
Vermont Traditions Coalition Wins ASQ Appeal on GMNF	3

Superior National Forest

By Ryan L. Woody

In 2004, the Forest Service produced its final version of its updated Land Management Plan for the Superior National Forest in northeastern Minnesota. As required by the National Forest Management Act ("NFMA"), the 2004 Plan was set to replace the outdated 1986 Plan. Following the adoption of the 2004 plan, environmental groups, led by the Sierra Club and Defenders of Wildlife, challenged the legality of the new plan. The plaintiffs alleged that the new plan violated the NFMA and the National Environmental Policy Act ("NEPA"). On November 15, 2007, the court dismissed the plaintiffs' NFMA claims leaving only the NEPA claims.

The plaintiffs claim that the Forest Service violated NEPA by failing to measure the impacts to the Boundary Waters in the Revised Forest Plan. In addition, the plaintiffs claim that the Forest relied upon faulty roads and trail data in passing the Plan. The Ruffed Grouse Society participated as an Amicus party and filed a brief arguing that NEPA does not require the Forest Service to consider future project impacts to the Boundary Waters in the programmatic Forest Plan. Second, RGS argued that the Court owes significant deference to the Forest Service in its compilation of its own



road and trail data.

A hearing on this case is set for early June in Minneapolis, MN. A decision is expected near the end of the summer. I fully expect that the Revised Forest Plan for the Superior National Forest will be upheld and future project implementation will begin in earnest. I have attached to this email a copy of my brief submitted on behalf of RGS. Please feel free let me know if you or your group has any questions about this case or any other.

**Ninth Circuit Court of
Appeals**



Lands Council v. McNair, 494 F.3d 771 (9th Cir. 2007).

By Ryan L. Woody

As reported last month, the full Ninth Circuit agreed to rehear this controversial logging case dealing with Forest Service methodology and the courts' deference to agency expertise. The case involved an injunction that stopped an Idaho logging project over concerns about the viability of the the flammulated owl. More details about the decision can be found in last months' newsletter.

However, arguments were presented to the 9th Circuit's en banc panel at the end of March. Audio recordings of this and any other of the 9th Circuit's oral arguments can be found at:

<http://www.ca9.uscourts.gov/ca9/media.nsf/media+Search?openform>

Based on the tone of the questioning from the judges it seemed clear that the court was ready to reverse its prior decision. The panel continually emphasized the multiple-use designation for the national forests and questioned why the flammulated owl should take precedent over the agency's ability to manage the forest to prevent forest fires and high fuel loads. The court also seemed inclined to give the agency full discretion over scientific methodologies involved in these decisions. One judge questioned, "why we would substitute our judgment for the agency as to what kind of science is appropriate." The attorney for the environmentalists did not seem to have a compelling answer other than prior 9th Circuit decisions required the agency to more definitively justify its methodology.

I imagine that the court's decision will not come out for several months. However, based on the tone of the arguments it seems to me like the 9th Circuit will reverse its decision and harmonize the law of the 9th Circuit with those of the others that grant deference to the agency on issues of scientific methodology.

Should you have any specific questions, feel free to contact me at rwoody@mwl-law.com

Green Mountain National Forest

Vermont Traditions Coalition Wins Appeal

By Ryan L. Woody & Norm Arseneault

In July 2006, the Vermont Traditions Coalition appealed the Revised Forest Plan for the Green Mountain National Forest. VTC argued that the Forest Service grossly miscalculated the Allowable Sale Quantity (ASQ) for the forest. The 2006 Revised Forest Plan added 72,000 acres of suitable lands into the timber base due primarily to land acquisitions for a total of 192,000 acres. Almost unbelievably the ASQ within the 2006 Plan remained almost identical to the 1987 Plan. VTC had consistently questioned the agency's calculation and felt that 192,000 acres of suitable lands should produce significantly more ASQ without changing prescriptions, guidelines or regulations. As it turned out VTC was right.



In July 2007, the Washington Office upheld VTC's appeal on the ASQ issue and sent the Plan back to the Forest. According to Washington, the agency has forgot to account for the topwood. Topwood is all the merchantable portion of the trees above the sawlogs. The GMNF called in the modeling calvary from and verified that they had indeed erred in their data modeling.

In February 2008, the GMNF Supervisor and Forest Planner met with the VTC and other appellants to give them the news. According to the Forest, topwood had been erroneously left out of the calculations. Including topwood will raise ASQ from 28,704 mcf/decade to 38,789 mcf/decade - an increase of 35%! The Forest will adopt the new ASQ as a "technical correction", not a formal amendment, which it hopes will avoid the ire of environmental groups.

According to the VTC this ASQ modeling error could be wide-spread across the national forest system. Apparently, the ASQ modeling contains calculations and system-wide data that may have affected all forests. The message is to keep an eye out for these ASQ errors in future planning decisions. However, VTC and all the other appellants deserve a round of applause for their efforts.

Should you have any questions or comments about this or any other topic please do not hesitate to contact Ryan Woody at rwoody@mwl-law.com

[This electronic newsletter is intended for the clients and friends of Attorney Ryan L. Woody. It is designed to keep you generally informed about developments in the law relating to National Forests and affiliated areas of practice and should not be construed as legal advice concerning any factual situation. This electronic newsletter is not to be used in lieu thereof in any way. Should you wish to be removed from this email list, please contact Ryan Woody at \[rwoody@mwl-law.com\]\(mailto:rwoody@mwl-law.com\).](#)